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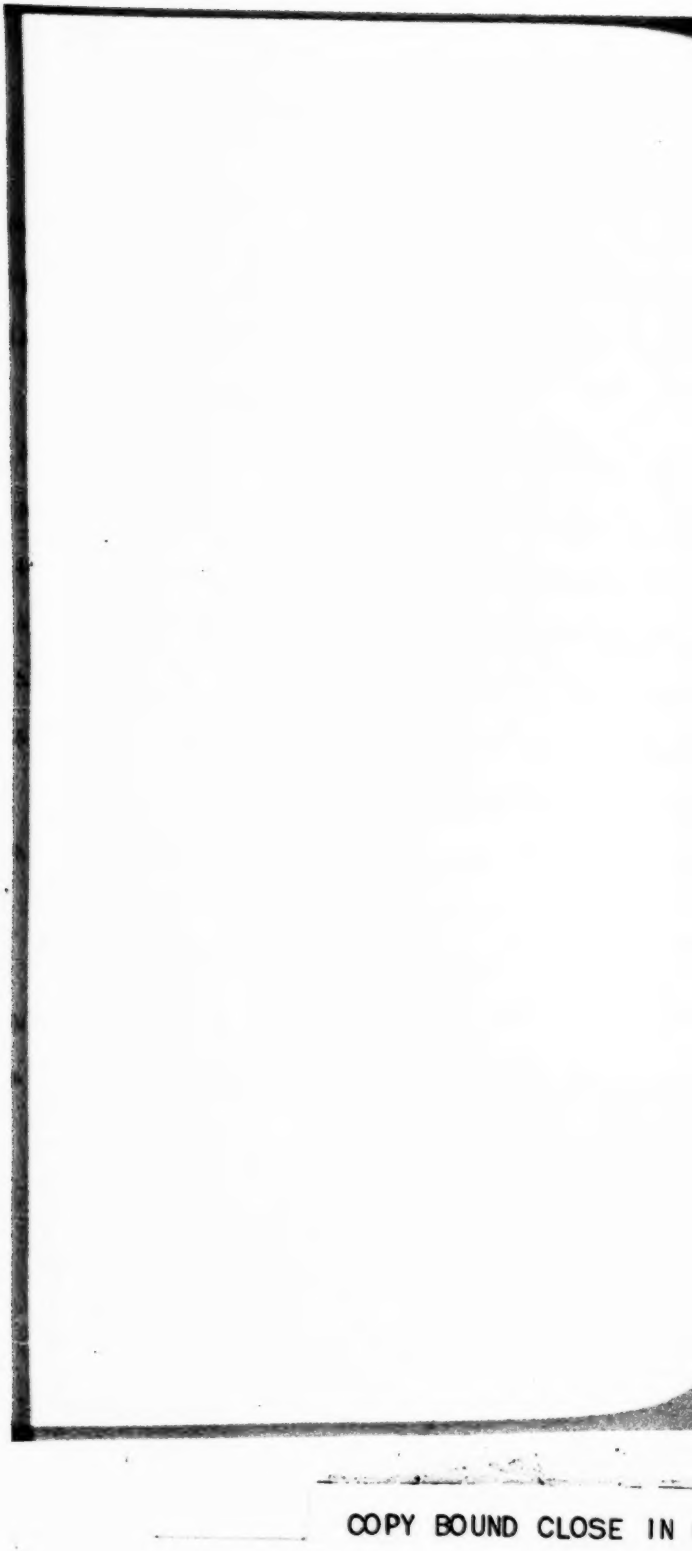

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MICHAEL S. ROSS
2879 Rutgers Avenue
Long Beach, California 90815
PH: (213) 425-5223
In Properia Persona

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL S. ROSS, Plaintiff, vs. THE UNITED STATES OF AMERICA, VETERANS ADMINISTRATION, DEPARTMENT OF THE AIR FORCE, L. B. ALFORD, A. J. MOYNIHAN, RHEA M. BURROW, ROBERT E. REICHMANN, ALBERT HOLTZ, GEORGE UNKELESS, NORMAN L. CARDEN, et al, Defendants.	CIVIL NO. 71-1909-EC APPELLATE NO. 72-1367 PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUDGES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner respectfully prays for a writ of certiorari to the United States Court Of Appeals for the

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Ninth Circuit to review an order of that Court entered June 28, 1972 sustaining the defendant's motion for summary judgment dismissing the complaint for want of jurisdiction of the sub,ect-matter.

SUMMARY OF LOWER COURT OPINIONS

Appellant's motion for summary judgment against defendant federal employee members of the Veterans Administration including members of the rating board in Los Angeles and the Board Of Appeals in Washington, D. C. for engaging in inaction and action outside, beyond and in want of their statutory authority in refusing to grant appellant the opportunity for the presentation of any oral and written evidence at a personal hearing on the matter of the existence of an illness and, if so, service-connection therefor exercised upon appellant's prerogative by operation of law under the Code Of Federal Regulations, Title 38, §19.3, §19.108, §19.133 (U. S. C., 38, §4002)

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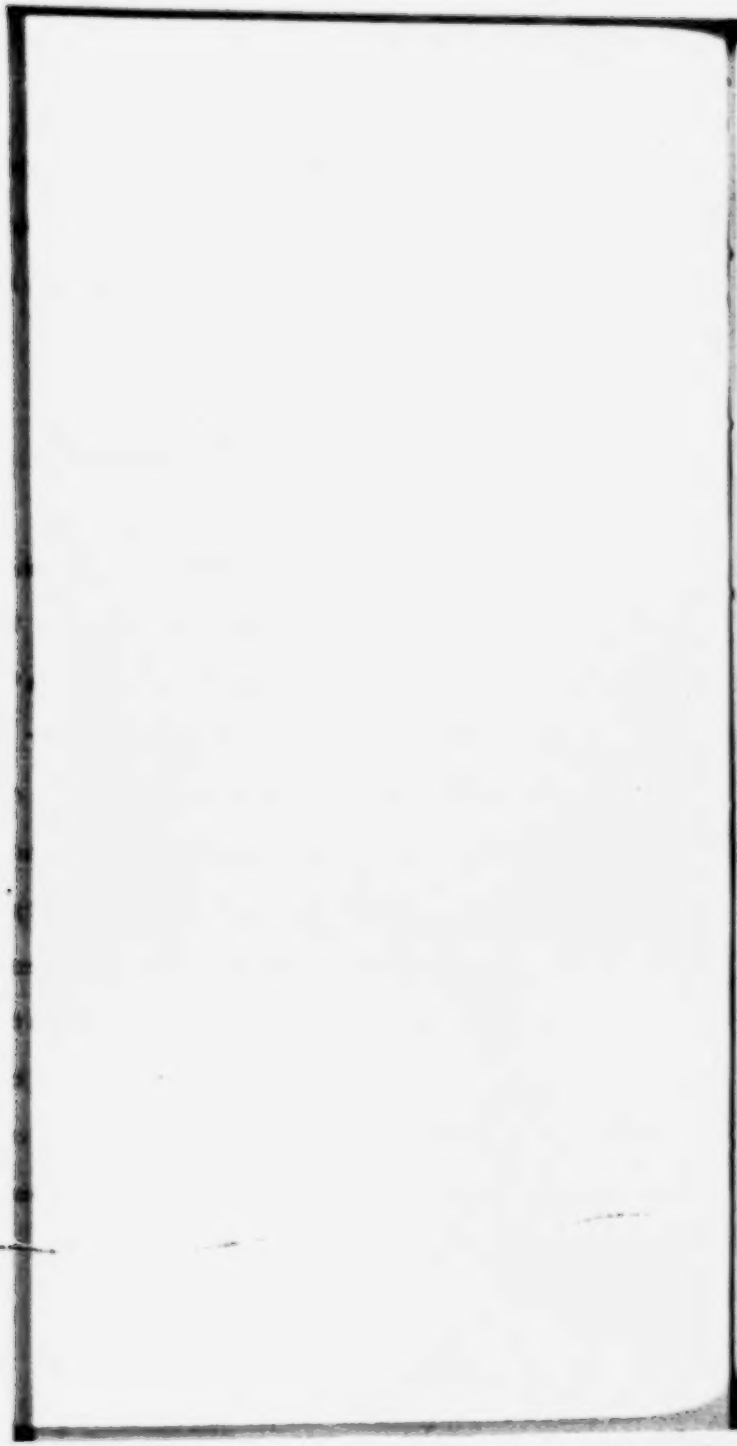

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§19.135, §19.137, §19.138, §19.144, §19.146 and §19.148 (U. S. C., 38, §4003) was denied on January 3, 1972 in Division 1, United States District Court For the Central District Of California, the Honorable Judge E. Avery Crary presiding, with respect to those Veterans Administration officials response to and interpretation of the statement of request for such a hearing made in appellant's Statement Of the Case filed December 6, 1967 (MSJ-22). The aforesaid motion was, however, sustained so far as it was founded upon appellant's innumerable oral prayers and requests for a hearing made to Veterans Administration contact officers during repeated Veterans Administration visits through the spring and summer of 1969 (MSJ-20 is just one example), but the District Court denied that monetary recovery could be allowed for the same. Appellant also challenged the constitutionality of U. S. C., Title 38, §211(a) upon which no ruling

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was made.

On January 5, 1972 appellant served notice on the defendant's counsel and thereafter perfected his appeal of the latter ruling denying monetary recovery and the former finding that appellant's written statements of December 6, 1967 and prior thereto were inadequate to bestow the aforegoing regulatory rights in him. On June 28, 1972 the Honorable Judges Browning, Hufstedler and Wright of the Ninth Circuit Court Of Appeals fuled that the complaint was, in substance, one to obtain judicial review of a final determination of the Veterans Administration and that "Title 38, §211(a) forecloses judicial review, with exceptions not here material, Fritz v. Director of Veterans Administration, 427 F. 2d. 154, (9th Circuit, 1970); Redfield v. Driver, 364 F. 2d. 812, (9th Circuit, 1966); Milliken v. Gleason, 322 F. 2d. 122, cert. denied, 379 U. S. 1002; see Lynch v. United States, 292 U. S. 571, 587, (1934). The Ninth Circuit

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also judged that "When the United States creates rights in individuals against itself, it is under no obligation to provide a remedy through the courts. It may limit the individual to administrative remedies, Tuten v. U. S., 270 U. S. 568, 576." (Lynch v. U. S., supra). Neither the opinion of the District Court or that of the Court Of Appeals is as yet reported, but both appear as addendum to this petition as Appendix A and Appendix B, respectively.

JURISDICTION TO REVIEW

The judgment of the Ninth Circuit Court Of Appeals was entered on June 28, 1972. See, Appendix A, p. 63, infra. This petition for certiorari was filed less than 90 days from the date aforesaid. The within action is fundamentally rooted in the mandamus statute of U. S. C., Title 28, §1361. It is moreover, the application of this statute which comprises the basis and is the subject

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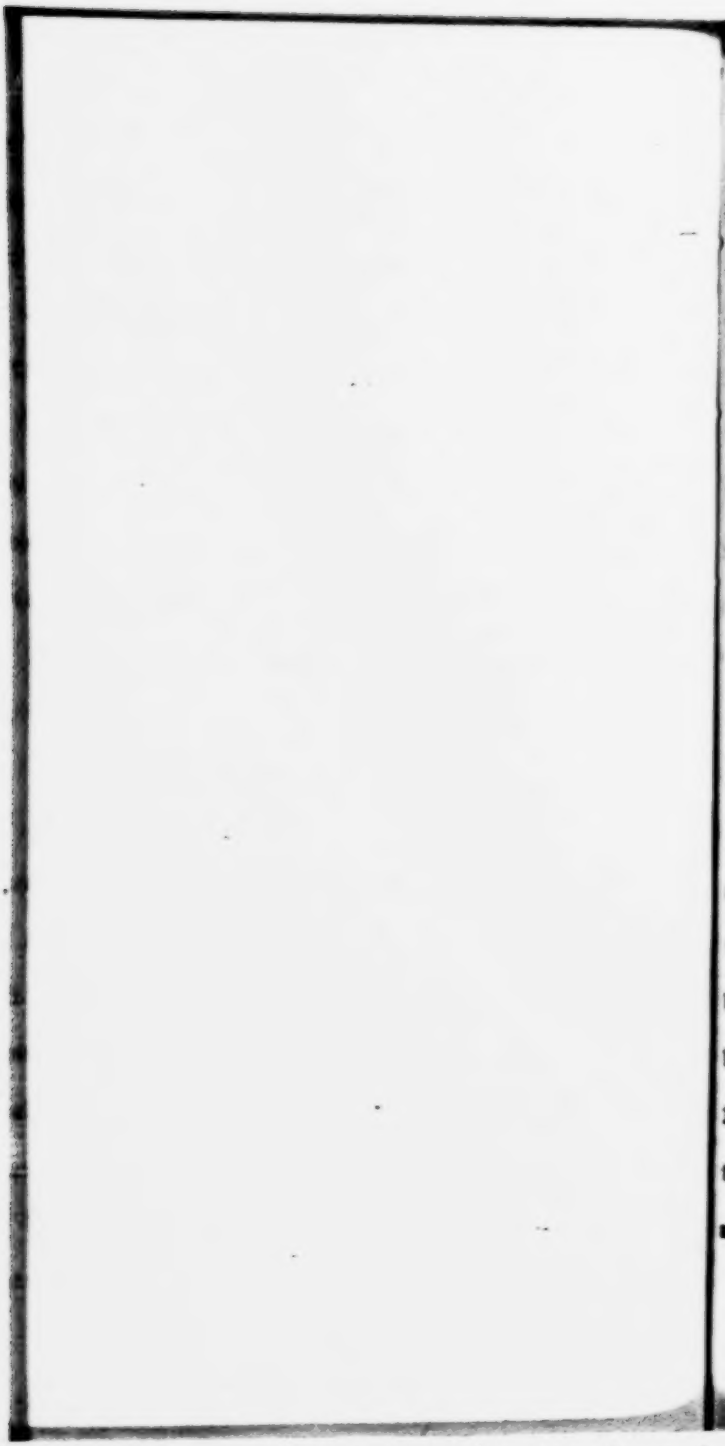

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of the present controversy. Jurisdiction is also premised upon the Tucker Act, U. S. C., Title 28, §1346, Federal Question jurisdiction, U. S. C., Title 28, §1331 and the Administrative Procedure Act, U. S. C., Title 28, §701 et.seq. A petition for rehearing before the Ninth Circuit Court Of Appeals was filed on July 17, 1972. The jurisdiction of thisCourt is invoked under U. S. C., Title 28, §1651(a).

QUESTIONS PRESENTED

Plaintiff brought suit under §19.133, §19.135 and §19.148 of the Code Of Federal Regulations and the Fifth Amerndment to the Constitution of the United States to void a prior "final" determination by the Veterans Administration, to recover his losses suffered as a direct and proximate cause of the mental pain, frustration and anguish incurred as a result of the negligence and fraud of certain

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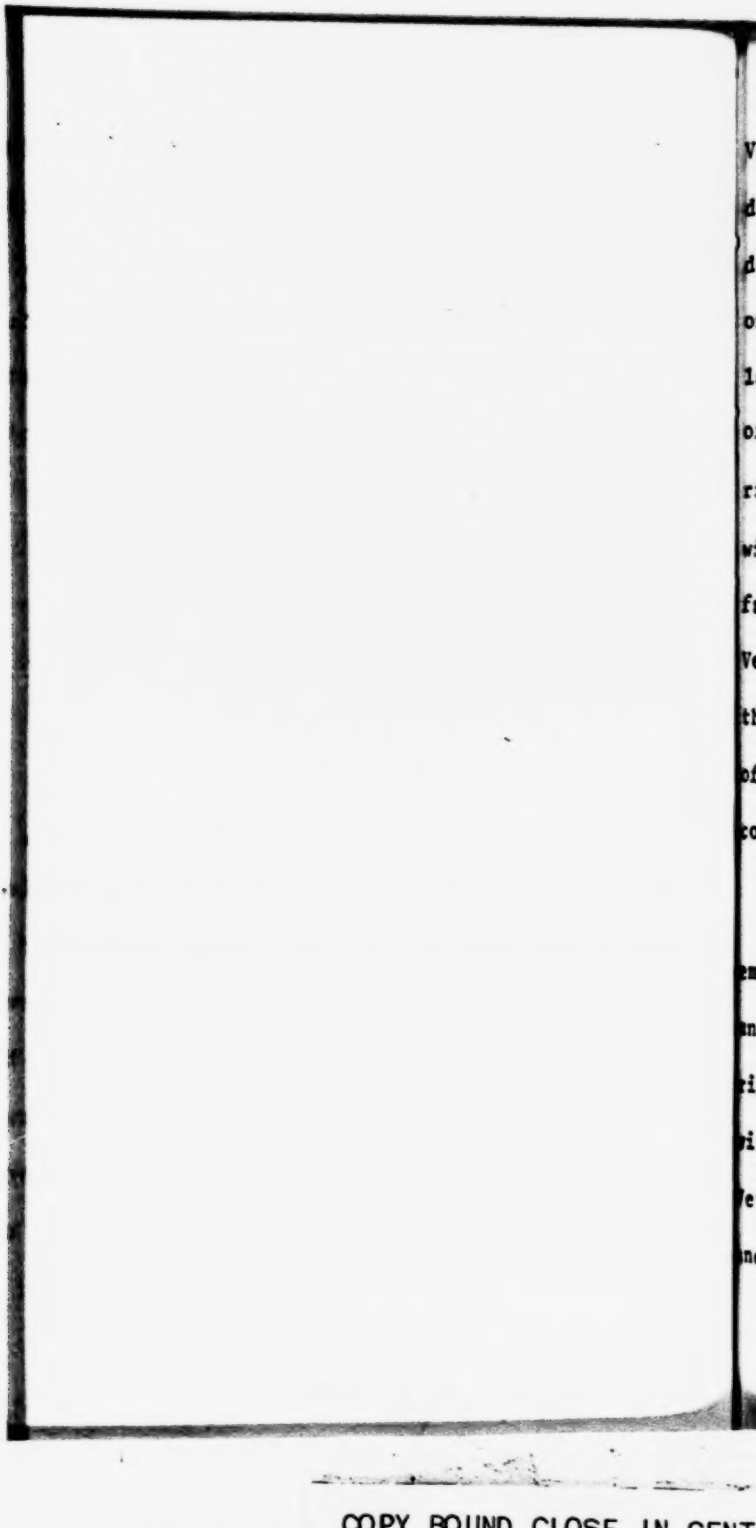

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Veterans Administration officials, including the defendants herein, in representing that none of the decisions of the Administrator of Veterans Affairs on any question of fact or law cognizable under the laws administered thereby are reviewable in a court of law by mandamus or otherwise, and to enforce his rights to a fair hearing, the presentation of witnesses in his behalf and the presentation of favorable evidence in a proceeding before the Veterans Administration. The crux of this dispute, then, stems essentially from the operation of a set of laws which may under certain circumstances conflict. The questions thereby arising are:

1. Whether the immunity doctrine for federal employees of the Veterans Administration invoked under 38 U. S. C., §211(a) as it conflicts with the rights of claimants to hearings, the presentation of witnesses and the presentation of evidence before the Veterans Administration embodied in §19.133, §19.135 and §19.148(b) of the Code of Federal Regulations

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precludes suit by claimants under the mandamus statute, U. S. C., §1361 to enforce the aforementioned rights against Veterans Administration officials?

a. Whether the intial "final determination" of plaintiff's claim for the benefit of the removal of a stigma from his record rendered by the Veterans Administration in February, 1968 is void under the Fifth Amendment to the United States Constitution in that it was entered without a hearing, though one was requested, upon denial of the opportunity to present witnesses in plaintiff's behalf and upon denial of the opportunity to present favorable written evidence?

b. Whether the named officials of the Veterans Administration are liable to plaintiff for the damages caused plaintiff because of their negligence, fraud and misrepresentation, at least to the extent of plaintiff's cost of suit?

c. Whether a writ of mandate should issue

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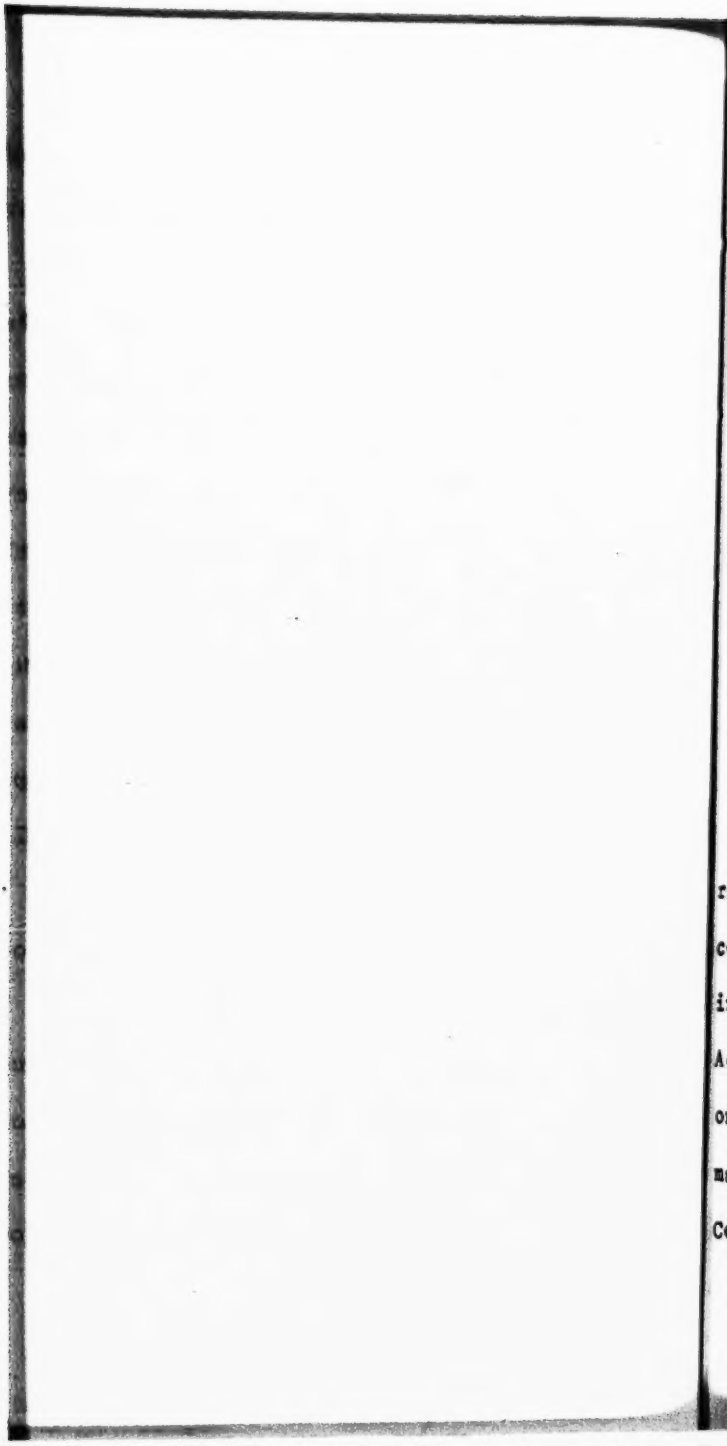

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to compel Veterans Administration rating board officials to grant plaintiff's hearing and the opportunity for the presentation of evidenciary and medical opinion testimony premised upon the true facts of the case as evinced in plaintiff's Naval Reserve record now on file with the Veterans Administration?

d. Whether, as a matter of law, the Veterans Administration is required to take judicial, or rather administrative notice of factual and evidenciary matters contained in any claimant's military record?

2. Whether in view of the repeated representations by Veterans Administration contact officers, other officials thereof and innumerable lawyers that neither the Veterans Administration nor its members could be sued on the basis of <u>any</u> decision of law or fact made thereby, plaintiff's conviction in Contra Costa County Superior Court premised solely

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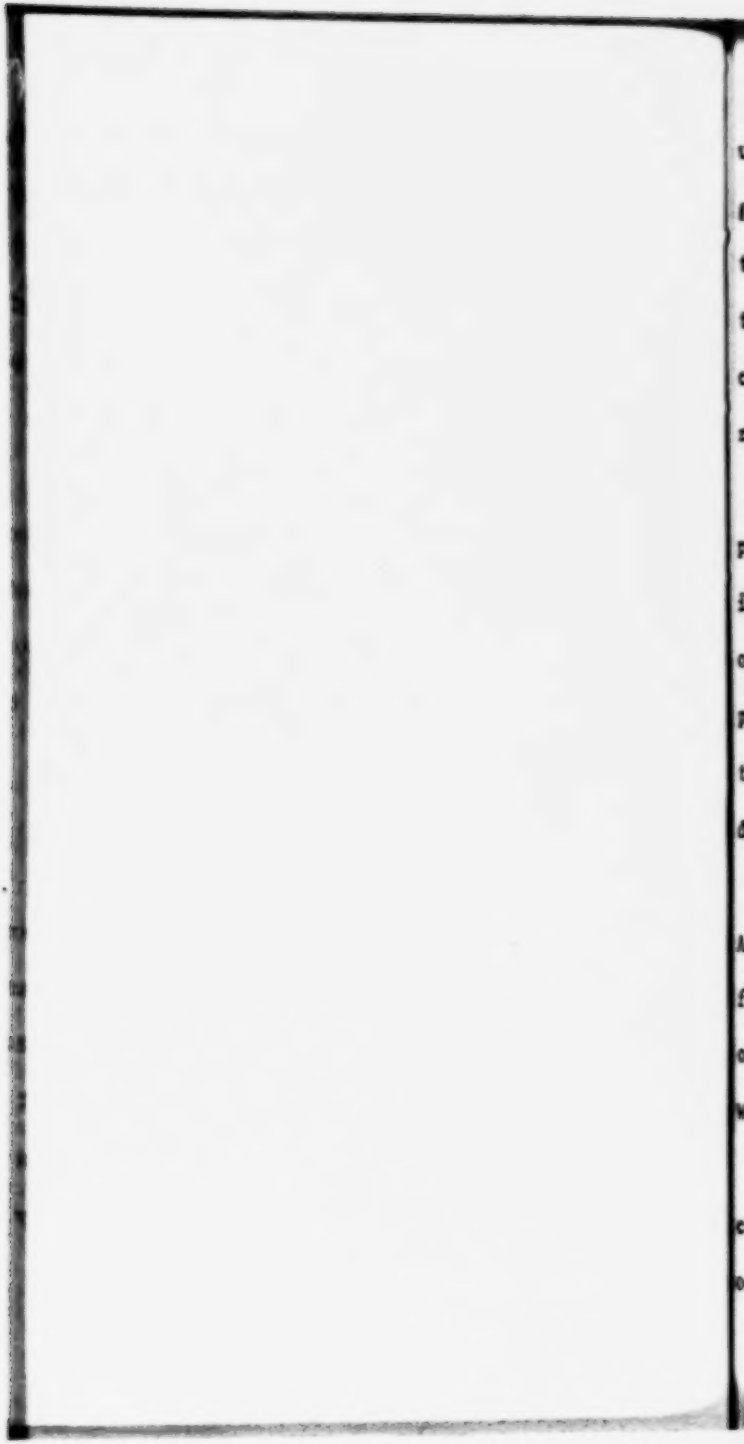
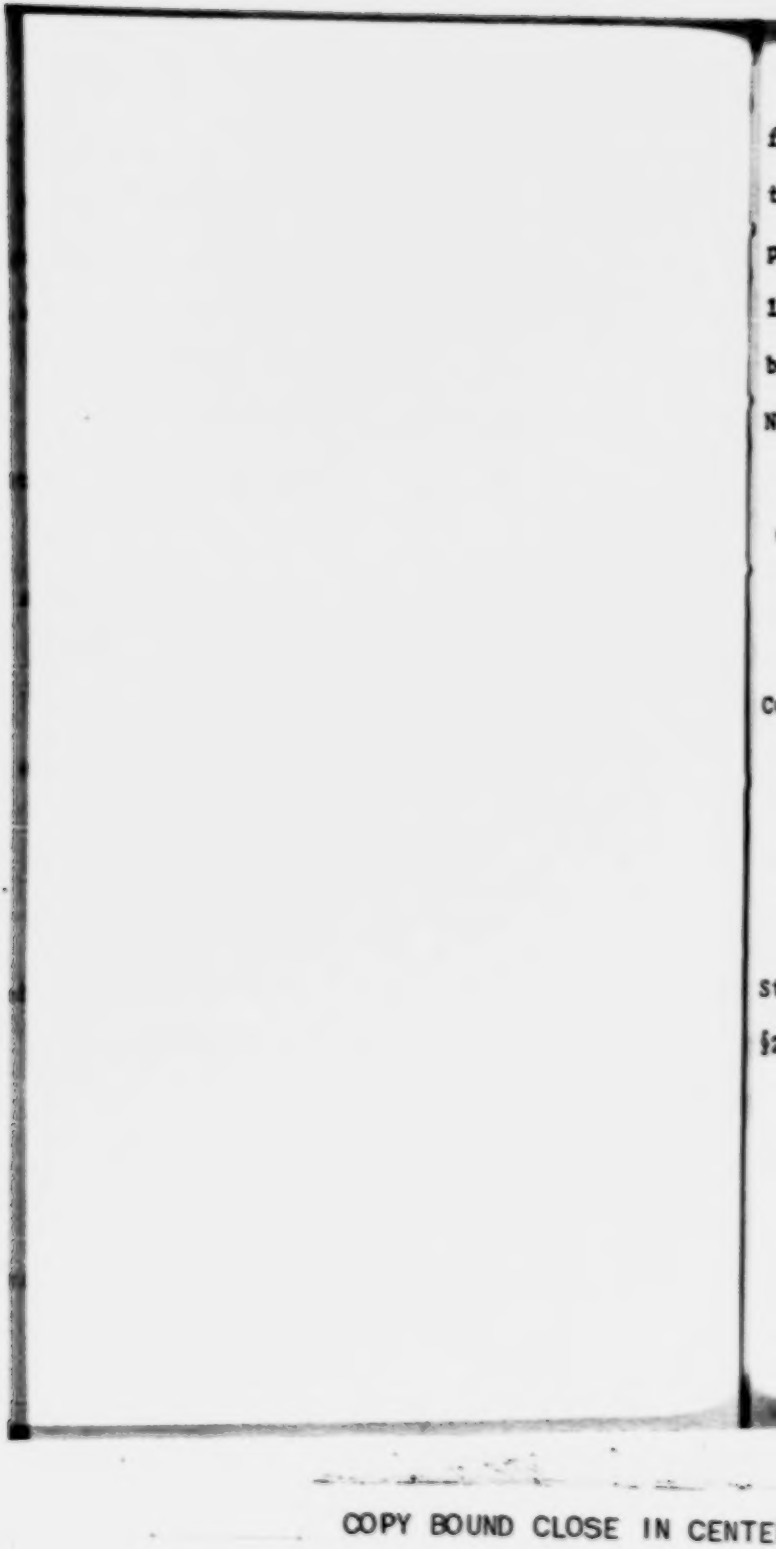


upon his own paid lawyer's extorted plea of guilty for alleged attempted extortion under the California Penal Code §524 for his attempt to have Dr. Carden advise Veterans Administration officials to accord plaintiff his deserved rights should be vacated?

3. Whether each of the attorney's whom plaintiff question as to the possibility of instituting suit against Veterans Administration officials to enforce his right to the due process of law and who advised plaintiff in the negative are liable to plaintiff for his damages suffered thereby.

4. Whether the defendant Veterans Administration officials should be removed from office in accordance with the recommendation of their own top counsel, Colonel Robert Walker??

5. Whether each and every traffic citation and accident on plaintiff's record occurring as a result of plaintiff's anger and



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frustration at not being given the opportunity to certainly clear his military record by proving Dr. Cardne's narration to be one huge lie and that, in fact, plaintiff had never been legally separated from the United States Naval Reserve.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

> "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."

Statute of the United States, U. S. C., Title 38, §211(a):

> "Except as provided in certain cases of insurance and vocational rehabilitation, in home, farm and business loans, the decisions

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of the Administrator of Veterans Administration Affairs on any question of law or fact concerning a claim for benefits or payments under any law administered by the Veterans Administration shall be final and conclusive and no other official or any Court of the United States shall have power or jurisdiction to review any such decision by mandamus or otherwise."

Statutes of the United States, U. S. C., Title 28, §1361:

"The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

Statutes of the United States, U. S. C., Title 38, §3003:

"§3003. (a) If a claimant's application for benefits under the laws administered

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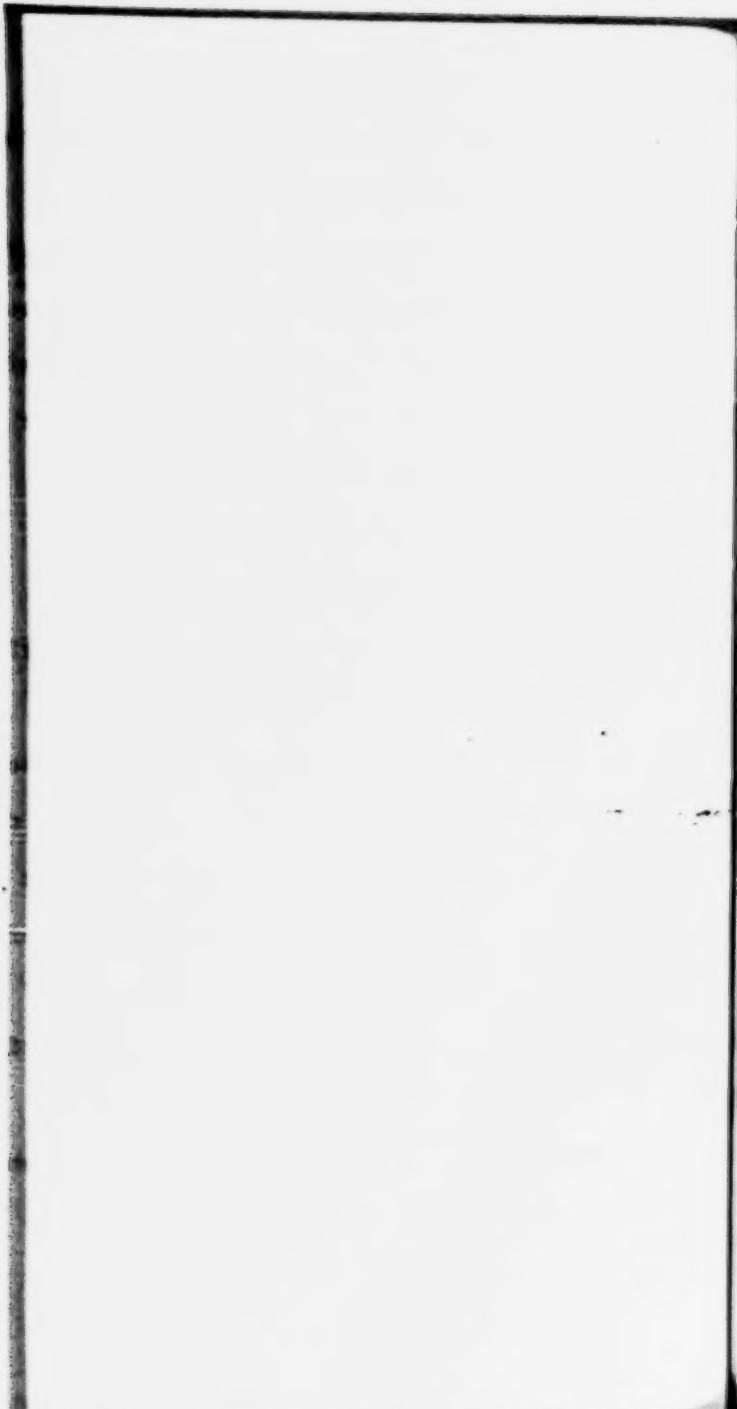
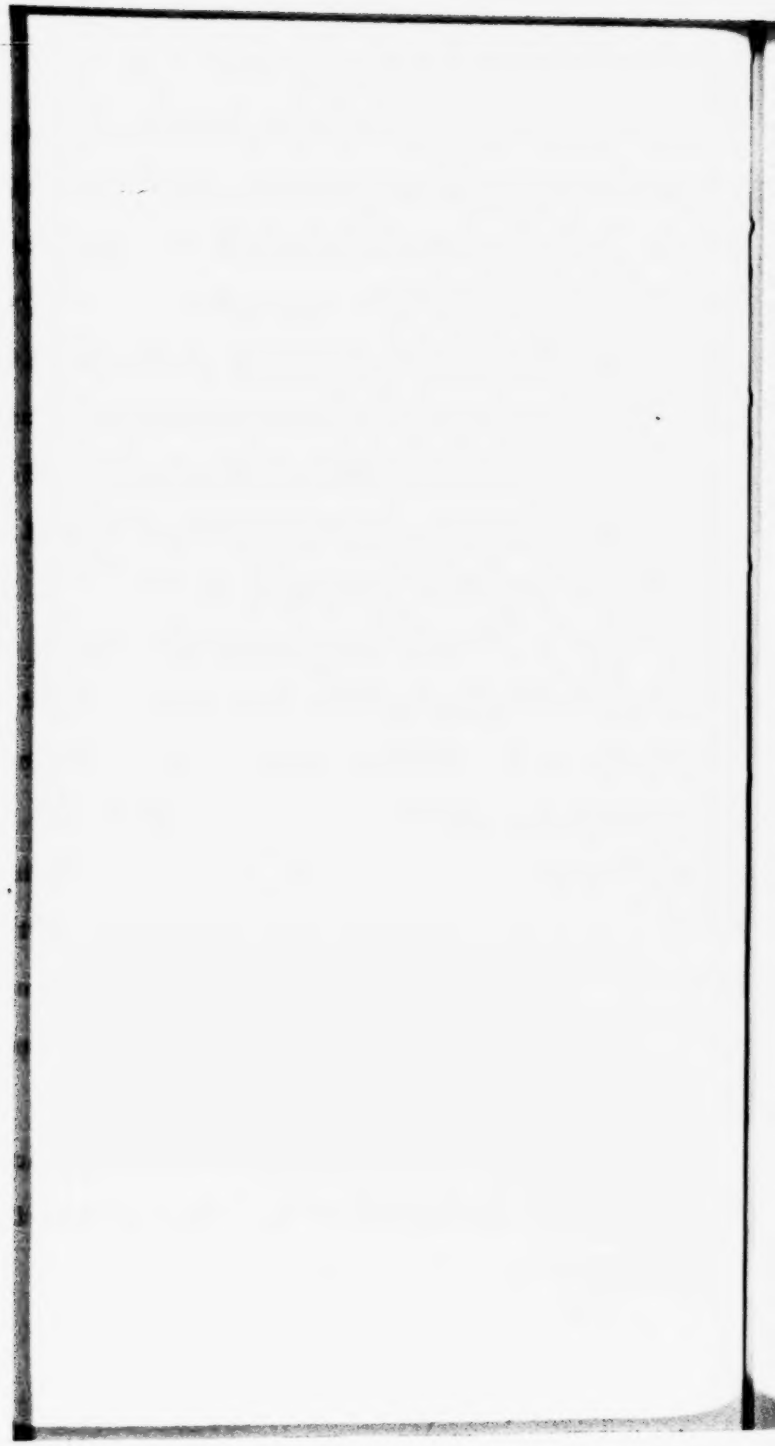


by the Veterans Administration is incomplete the Administrator shall notify the claimant of the evidence necessary to complete the application. Is such evidence is not received within one year from the date of such notification, no benefits may be paid or furnished by reason of such application.

Statute of the United States, U. S. C., Title 38, §3311:

"For the purposes of the laws administered by the Veterans' Administration, the Administrator, and those employees to whom the Administrator may delegate such authority, to the extent of the authority so delegated, shall have the power to issue subpenas for and compel the attendance of witnesses within a radius of one hundred miles from the place of hearing, to require the production of books, papers, documents, and other evidence, to take affidavits, to



administer oaths and affirmations, to aid claimants in the preparation and presentation of claims, and to make investigations and examine witnesses upon any matter within the jurisdiction of the Veterans' Administration. Any person required by such subpena to attend as a witness shall be allowed and paid the same fees and mileage as are paid witnesses in the district courts of the United States."

Statute of the United States, Administrative Procedure Act, 5 U. S. C., §702:

"A person suffer legal wrong because of agency action, or adversely affected or agrieved by agency action within the meaning of a relevant statute, is entitled to judicial review."

Statute of the United States, Administrative Procedure Act, 5 U. S. C., §706:

"To the extent necessary to decision

and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

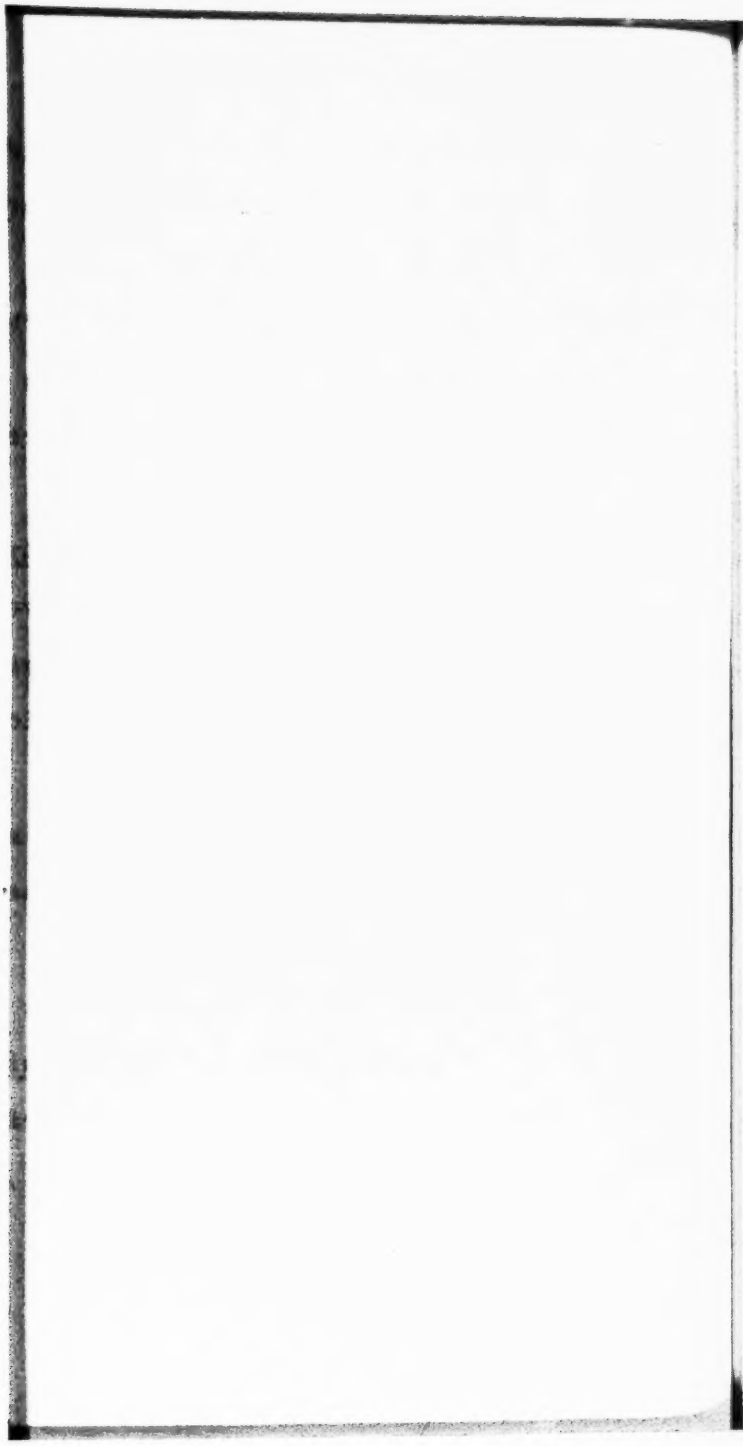
(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction authority, or limitations,, or short of statutory right;



(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court."

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

Regulation of the United States, 38 U. S. C., §19.133:

"a) A hearing on appeal shall be

granted where a claimant or his representative expresses a desire to appear in person.

b) Purpose. To receive argument and testimony relevant to the appellant issue."

Regulations of the United States, 38 U. S. C., §19.135:

"The testimony of witnesses will be heard."

Regulations of the United States, 38 U. S. C., §19.148:

"Reconsideration of an appellate decision, otherwise final under rule 4, §19.04, may be accorded by the Veterans Administration appeal board upon:

a) Allegations of errors of fact or law by the claimant or his representative, or on the board's own motion;

b) Discovery of additional service department records;

c) Administrative review under the authority delegated by §19.2."

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STATEMENT OF FACTS

The facts relevant to the questions presented by this petition are not controverted and therefore may be introduced to the Court in a summary fashion.

From enlistment in May, 1961 until September, 1963 the petitioner, Michael S. Ross, excelled in all phases of Naval Reserve training, advancing rate at each opportunity in absolute minimum time. After more than a year of training at Los Alamitos, NRSD 11-3 in a twenty-one month long service course to become an electronic technician third class, petitioner became somewhat disenchanted with the low moral character displayed by a large contingent of the enlisted ranks and, thus, when the opportunity to become a Naval Reserve officer presented itself, he jumped at the chance to serve his country and the ideals of democracy in a more righteous status.

During the months from July to August, 1963 the first summer of a two phase training program

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as a Reserve Officer Candidate was conquered. The succeeding school year was commenced at U. C., Berkeley to whence petitioner had transferred during the interim from Long Beach State College in order to complete his educational training in the study of chemical engineering. Study a Berkeley was an extremely enjoyable but arduous experience, however, the accompanying transfer of Naval Reserve units was a rude shock. Having nearly mastered the materials necessary for advancement to electronic technician third, petitioner was prepared to polish it off within his first few months at Treasure Island, San Francisco NRSD 12-26, but the "so called instructor" there, a first class electronic technician refused to provide any instruction whatsoever. Moreover, that first class abstained from dispensing any assignments, practical factors examinations or achievement tests and procured no advancement examinations. Throughout this ordeal, petitioner repeatedly requested, cajoled and demanded the first

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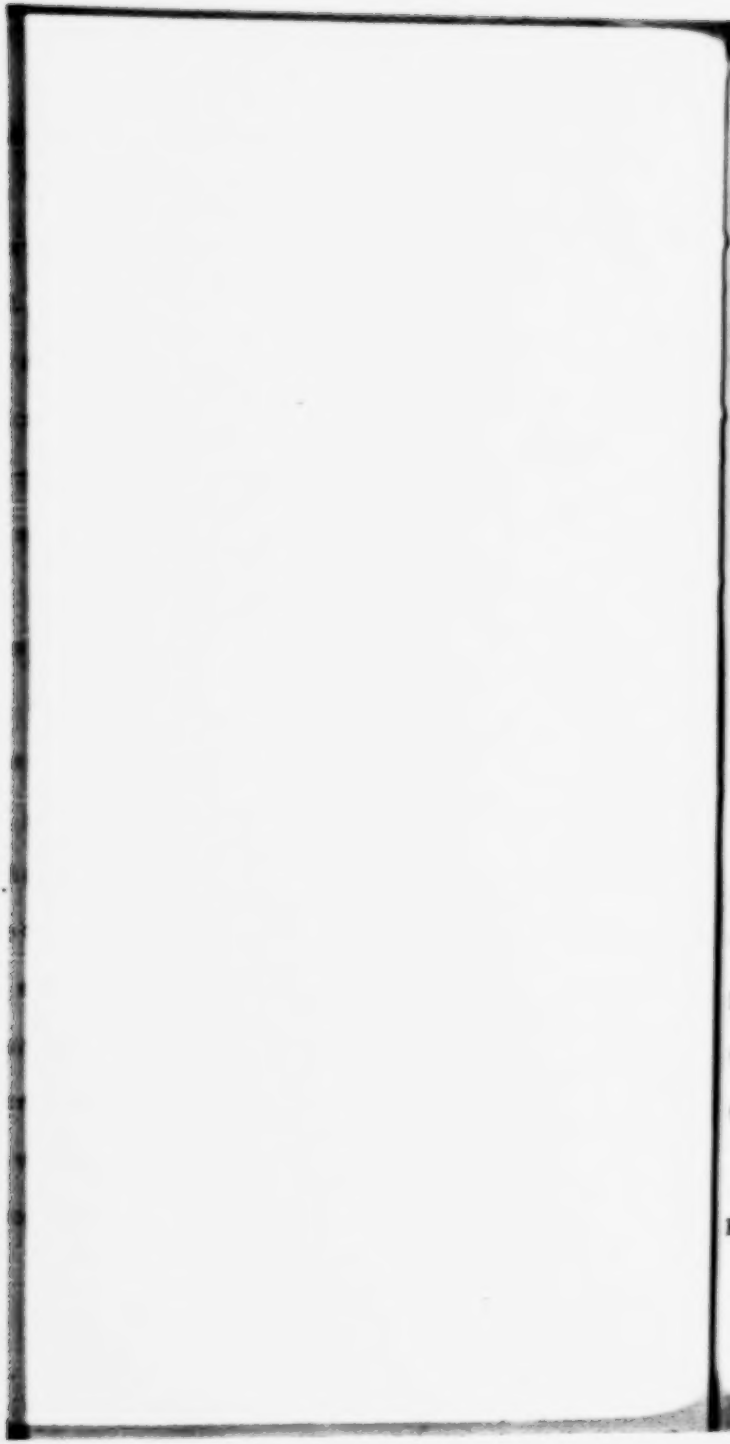

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class to get on with his job of teaching." Such implorations the man generally ignored, but when he did answer it was with a resounding rejection! Consequently, petitioner attempted to pick up the study from whence he had left off at NRSD 11-3, but with the difficulty of the subject-matter and the encroachment of time on his college studies he soon realized that to pursue such a course was futile. Whereupon petitioner resolved himself to becoming the best Naval Reserve Officer possible and so began the practice of bringing his college material to the electronic technician classroom to study. Concurrently, petitioner refused to give up the opportunity of becoming an electronic technician and sought to engage the authority of his division officer, training officer and finally the commanding officer to compel this first class to perform his teaching duties--all to no avail.

Petitioner was due to complete training for the Reserve Officer Candidate program in the summer

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of 1964, but prior to the date set he petitioned the supervisors of that program to be allowed to postpone that training for one year in order that he might earn money to aid his parents in financing his education. This action was approved and undertaken.

Finally, after nearly two years of the practice of studying chemical engineering during electronic technician class hours, petitioner decided that trying to concertrate on such highly technical subject-matter amid the boisterous babblings about dirty women, war stories and personal experiences was highly inefficient and stupid. Therefore, on or about the drill of March, 1965 petitioner decided to seek solitude and tranquility for his study hours in another corner of the building and so omitted to attend one classroom session though he was present at the drill.

Apparently, this act so upset the first class's

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program enough that he felt he had to tattletail to NRSD 12-26's captain, Commander J. J. Holst about petitioner's activities.

No sooner did petitioner walk into the next month's drill than he was summoned to Commander J. J. Holst's office. Whereupon, without warning, he was immediately greeted with the admonishment that the commanding officer would recommend his removal from the Reserve Officer Candidate program for "unofficer-like" conduct. This meant that everything petitioner had worked so long for in the Naval Reserve program was down the drain for no reason. Accordingly, petitioner protested vehemently asking for an investigation of the electronics technician classroom training, a hearing on whether petitioner had engaged in "unofficer-like" conduct and a hearing on whether petitioner should be removed from R. O. C.

Petitioner was fraught with anxiety and frustration and not appreciating that there was

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a legal solution to his anomaly, as no legal grounds had been asserted for his dismissal, petitioner inquired into the feasibility of moving to the Air Force. The local recruiter advised that petitioner could effect such a transfer, but only at the expense of extending his committment to four years plus boot camp. Not desiring the unwarranted deleterious record placed on him by NRSD 12-26 accompanying him in his service career, petitioner reluctantly inquired into the possibility of becoming an Air Force officer.

The commanding and executive officers of NRSD 12-26 received notice of petitioner's inquiry before the next drill. In approximately April, 1965 petitioner was again called before the commanding officer who advised petitioner that he would and then he, in fact, did inflict upon petitioner the further punishment of transferring him involuntarily to the fleet reserve

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where there was no chance of advancement and where petitioner was obligated for an addition drill session on Friday evening each month.

Thereafter petitioner even more feverently sought to extricate himself from the Navy. For nearly a year he struggled ttod and nail to free himself from the clutches of the Navy and into the Air Force as an officer as the lesser of two evils. Success was ultimately achieved on February 21, 1966, one day before petitioner was due to begin Officer Training School at Lackland AFB, Texas.

Commissioning as U. S. A. F. second lieutenant occurred in May, 1966. Thereafter the new graduates preparing to embark for weather officer school at San Jose State were given three choices. In the month interim before commencement of the school year one could work at Lackland in the 100°F heat, arrive at the assigned duty station and hope that the commander had some work to do, if not, leave

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would begin running as of the date of departure from Lackland and finally one could take leave immediately docketed against accrued leave time and that to be garnered in the upcoming year of duty.

Petitioner chose the latter course and it was while he was home on leave that his girl friend of nearly two years who had seen, supported and upheld him through the long period of chicanery, skulduggery and extortion of NRSD 12-26 informed him that she did not love him and that she had had another secret lover from the first. Petitioner was quite shocked and depressed. The one who had passified and comforted him through the illegal extortive activities perpetrated by NRSD 12-26 and mollified him through Air Force Officer Training School was gone. He was haunted by the thought of aiding and abetting criminals, commander J. J. Holst and the first class electronic technician instructor. Was he prepared to die to protect these insane criminals?

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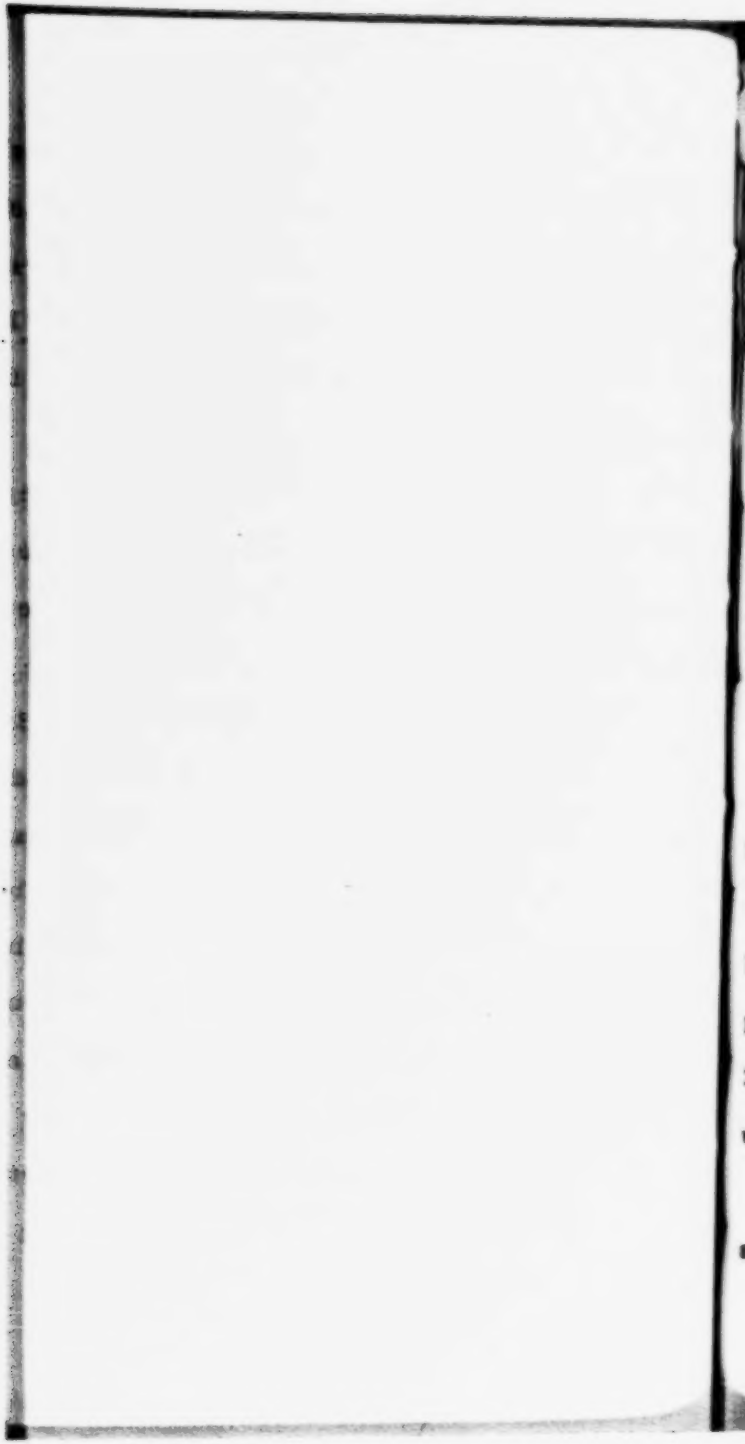
No, he was not!" To die protecting these acts would be to die for nothing." He could not be placing his life on the line to preserve democracy, for if there was any democracy left then he could not have been extorted from being a Naval Reserve officer."

Petitioner was quite upset over having nothing and no one to fight for." Petitioner's sweetheart knew of the existence of the Long Beach Mental Health Clinic because her sister had been undergoing treatment there for some time in the past." Consequently, she suggested going down to have a talk with Mrs." Helen Burke, a social worker."

Petitioner refused for a long time, but was finally cajoled into doing so reasoning that if there was any difficulty whatsoever it would be best to have it rectified as expediently as possible in such a manner that no one would be any the wiser." After a few moments, it was obvious that Mrs." Burke was incompetent to do anything to cheer



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petitioner up. Therefore, petitioner asked to see the Health Center doctor for an evaluation so that the existence or non-existence of a malady could readily be ascertained and petitioner's mind freed to perform his duties or, if deemed necessary, treatment could begin outside the hated military. This request was refused. Instead, Mrs. Burke excused hereself to a backroom and, from what later appeared, unauthorized and unbeknownst to petitioner, his parents or his girl friend called the nearest military facility, San Pedro Army Base. In about twenty minutes two men arrived from the base. Next morning the doctor at San Pedro indicated that he was going to transfer petitioner to Camp Pendleton. Anticipating the present situation, petitioner suggested that if he must go, at least, let him go to his own kind, the Air Force. This was accomplished.

In a few days petitioner talked to Dr. Carden at March AFB. For the first forty minutes Dr. Carden

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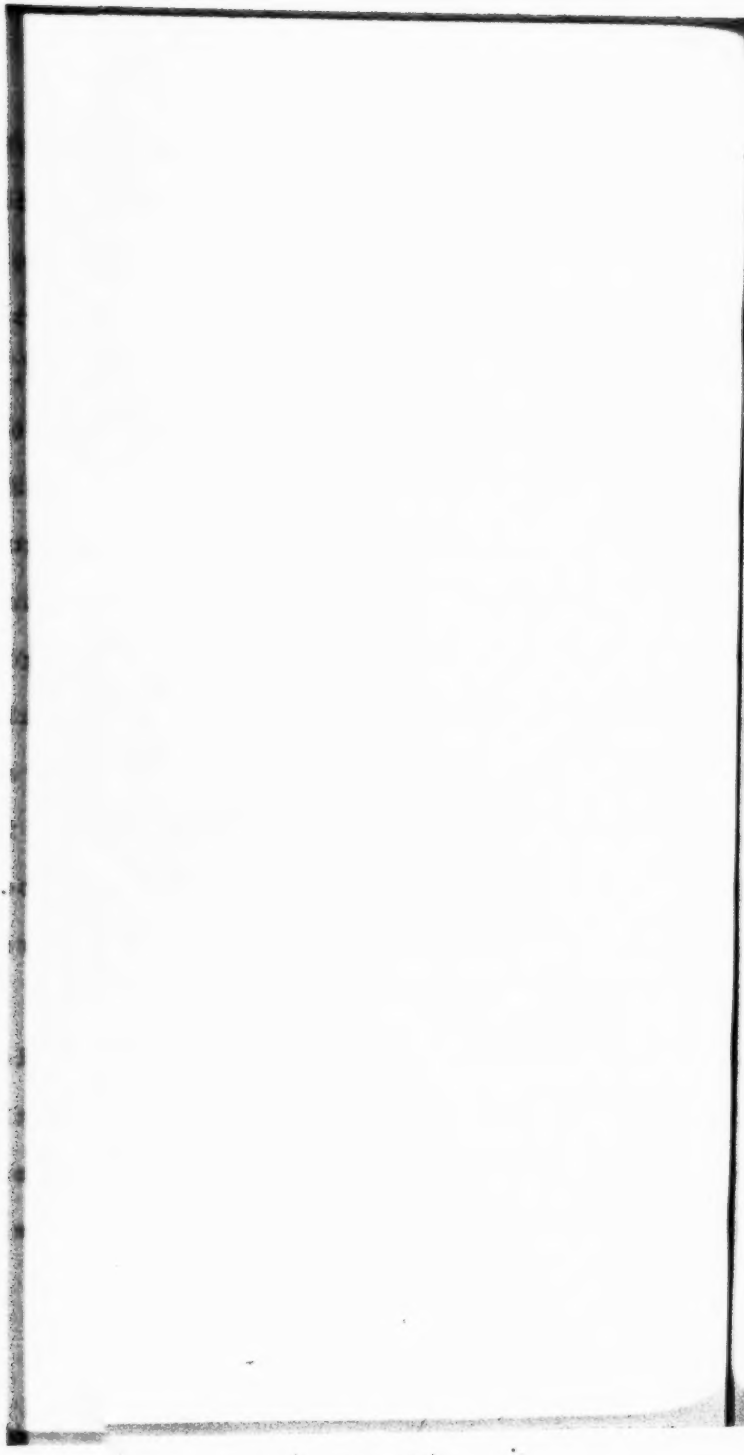
restrict his questions to the subject of previous disappointing romantic entanglement of petitioner Only for the last half a minute or so did the topic turn to petitioner's military career. Even then, the questions by Dr. Carden were prefaced by, "Let's see. You began your service in February, 1966." Petitioner replied, "No, that is not true and proceeded to explain the aforementioned history of his Naval Reserve service. Except for the testing which revealed only petitioner's anger for what the military had done and to say hello in the morning, that is the last petitioner saw of Dr. Carden until his discharge on August 24, 1966. Unfortunately, Dr. Carden must have been listening to that conversation with deaf ears, for his report issued a few days prior to petitioner's discharge indicated that petitioner had received normal, rational treatment in the Naval Reserve and had been tendered a commission as an Ensign but had voluntarily given these up



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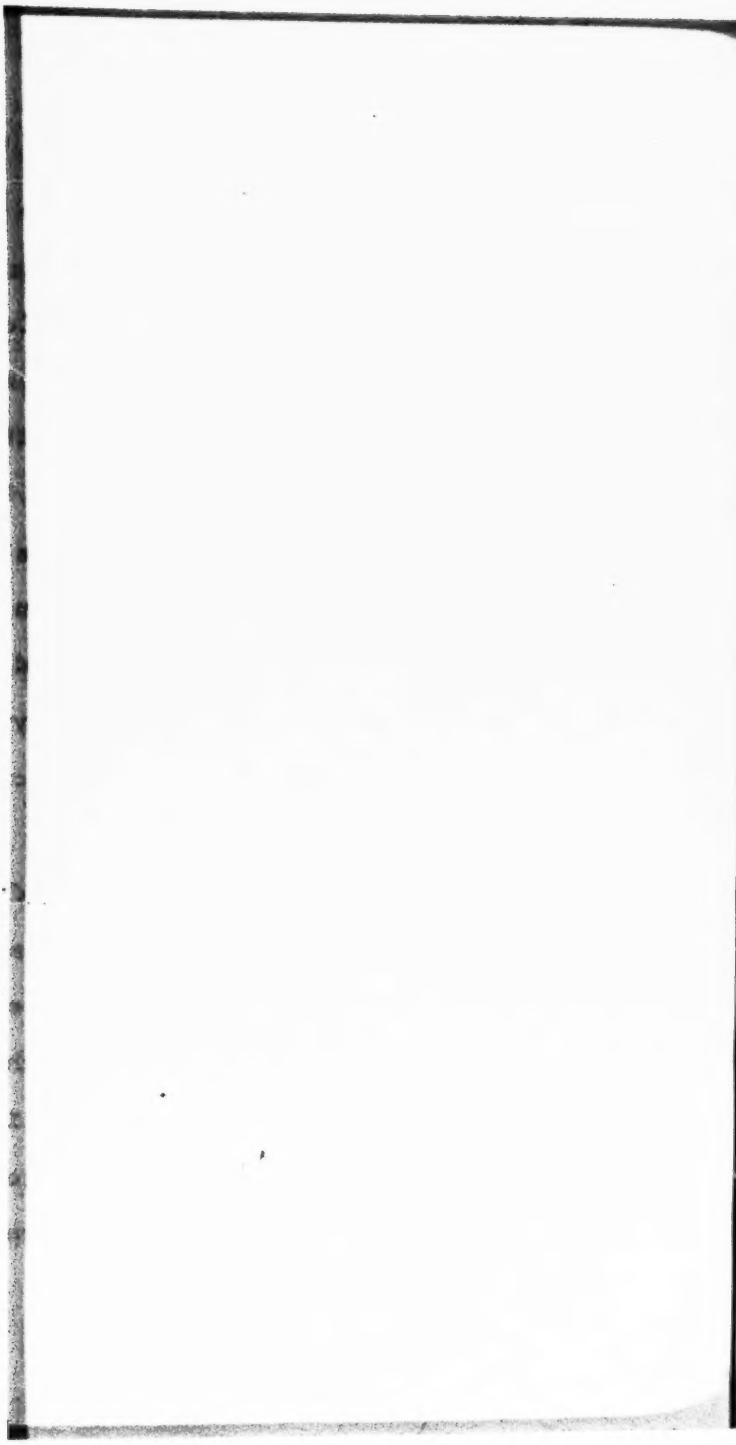
to join the Air Force.

On August 15, 1966, nine days prior to his discharge from the Air Force, petitioner spoke with a Veterans Administration contact officer and obtained Veterans benefits application form.

Petitioner was extremely relieved by the thought of not having to kill for nothing, be killed for no reason and suppress an illegality. He ardously sought employment in his chosen field of chemical engineering. But, when he told the truth of all the aforementioned facts thway he had been reered and the only way he knew how to be, honest, all the employers who had been so prolific in his undergraduate years and had, infact, rather aggressively solicited his services rebuffed him at every turn. One highly desireable prospect, in fact, the Shell Oil Company which had offered him employment by mail knowing full well all the aforementioned circumstances reneged on their offer subsequent to receipt of a favorable



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report on petitioner's mental condition by their own company doctor.

At about this time petitioner secured a favorable psychiatrist's report substantiating petitioner's mental well-being and concurrently therewith filed an application with the Veterans Administration for removing Dr. Carden's stigma, preferably on the grounds that he was never legally separated from the Navy or secondarily that the reaction was instantaneous, due only to illegal military activity and would remain only so long as the illegality remained unrectified.

In this manner petitioner proceeded for the next sever months, unemployed, until March, 1967 when Pacific Lightin Service and Supply Company of Los Angeles took pity upon him and hired him as a mechanical engineer. They asked no questions about the military.

Defendant rating board officials processed petitioner's application by June, 1968 asserting

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that the alleged illness was a continuing one and that petitioner had been in treatment for the same prior to his entry into the service." These findings were made without the submission of one shred of evidence in petitioner's favor."

Days later petitioner submitted his appeal of the unfounded Veterans Administration decisions." In the two step response required by law, petitioner first replied inquisitively, "The fairest disposition of this case would probably be a hearing before a judge with all the appropriate witnesses present to testify," asking,for a hearing which would be completely dispositive and simultaneously for the government's consent to suit."

Later, pursuant to the directive of Veterans Administration form VA 1-9, petitioner related that he was in disagreement with all the findings of the Veterans Administration rating board and that Dr." Carden's account of petitioner's record a lie, fradulent and a complete fabrication and repeated

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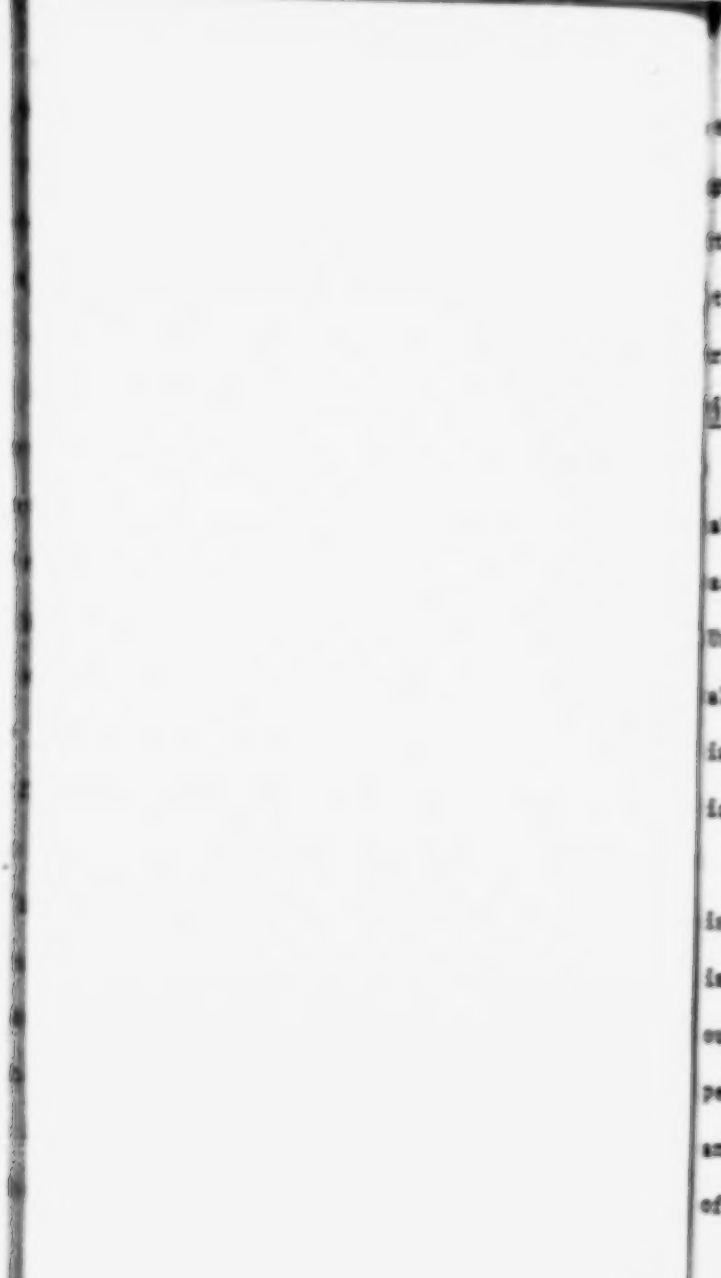

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the true narration described herein. At this time petitioner further asserted that he could prove all the aforementioned facts by favorable eye-witnesses testimony, satisfying, petitioner thought, the requirements for a hearing set forth in Title 38, §19.133 of the Code of Federal Regulations.

Fortunately, in the meantime petitioner was able to gain a more chemically related position as a process engineer at Stauffer Chemical Company. Unexpectedly, however, this position was subsequently altered to become, a far less desireable to petitioner, in plant manager prospective position. Petitioner is a scientist and has always been a scientist.

The decision rendered by the Board Of Appeals in February, 1968 was a replica of its prior imbicility based again upon no evidence. The shut out, without a chance, was a crushing blow to petitioner petitioner's belief in democracy, equality of rights and allegiance to the preservation of the principle of the due process of law and the deprivation of

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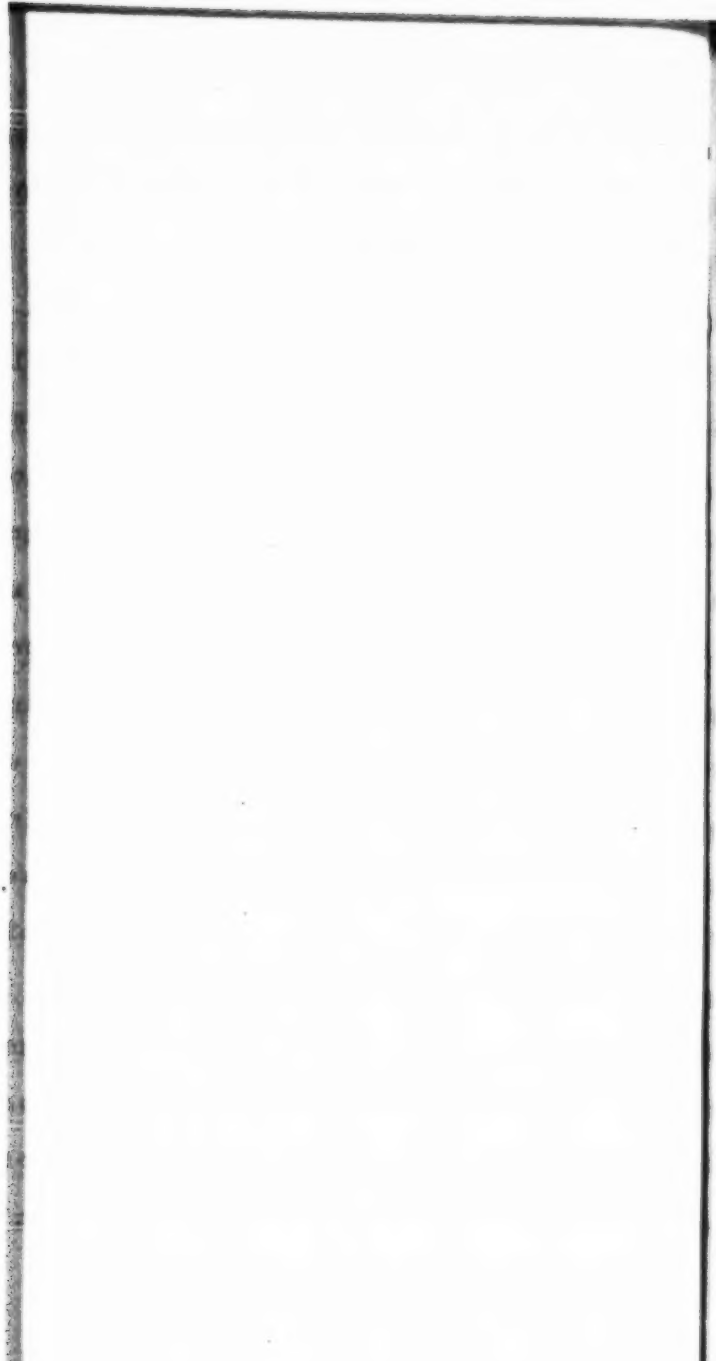
petitioner's rights perpetuated was to complete and devastating as to preclude any suit against the Veterans Administration by mandamus for hearing evidence or otherwise outside of those exceptions specifically delineated by United States Code, Title 38, §211(a) cited as authority therein.[xxi] Again, no hearing was provided or noticed in response to petitioner's request.[xxii] Furthermore, no notification of a lack of evidence was forthcoming.[xxiii] Petitioner had an impeccable driving record prior to this ridiculous determination and close out of petitioner's citizenship that rang with the sound of the finality of doom itself.[xxiv] Here was presented the classical case of an obvious legal right without seemingly any remedy.[xxv]

The apparently whimsical and obviously prejudicial conduct resorted to by the Veterans Administration in order to usurp petitioner's citizenship and his opportunity to secure employment in his chosen field of chemical engineering

research and the flagrant disregard for the rights of others enunciated by the Veterans Administration so shocked and angered petitioner that he soon lost his bride to be and later as a direct and proximate result of the Veterans Administration's illegal activities his employment fell by the wayside.

Sometime later, in 1969, when petitioner returned to school seeking a Master's degree in chemical engineering in order to vacate, avoid, overturn and excape the false stigma placed upon his person by Dr. Carden's unauthorized involvement in petitioner's life, he had occasion to visit the Los Angeles facility of the Veterans Administration in pursuit of educational benefits--necessitated only by the departure from his chosen employment. While in this pursuit, with the Veterans Administration, petitioner repeatedly urged his desire to be allowed a hearing on his case and be allowed to present even that portion of the total evidence in existence and set forth to be



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favorable to petitioner in each of his prior applications and then in his custody.[sic] On each such occasion the opportunity for such hearing was denied by a contact worker.[sic] Though petitioner protested vehemently that he had not been allowed a requested hearing or the admission of any evidence, the contact officers instructed that he could only have a hearing on the introduction of new evidence.[sic]

Thus, petitioner mentally searched for further material evidence which would reopen his case.[sic] On one occasion he learned that the Veterans Administration was not in possession of his Naval Reserve record as he had previously suspected and, therefore, had not considered it.[sic] Consequently, petitioner his upon the brilliant idea of availing himself of this document as his new evidence.[sic] If only somehow he could get it before the Veterans Administration.[sic] Knowing that this record would positively controvert and show with undeniable certainty the absolute falsity of Dr.[sic] Carden's

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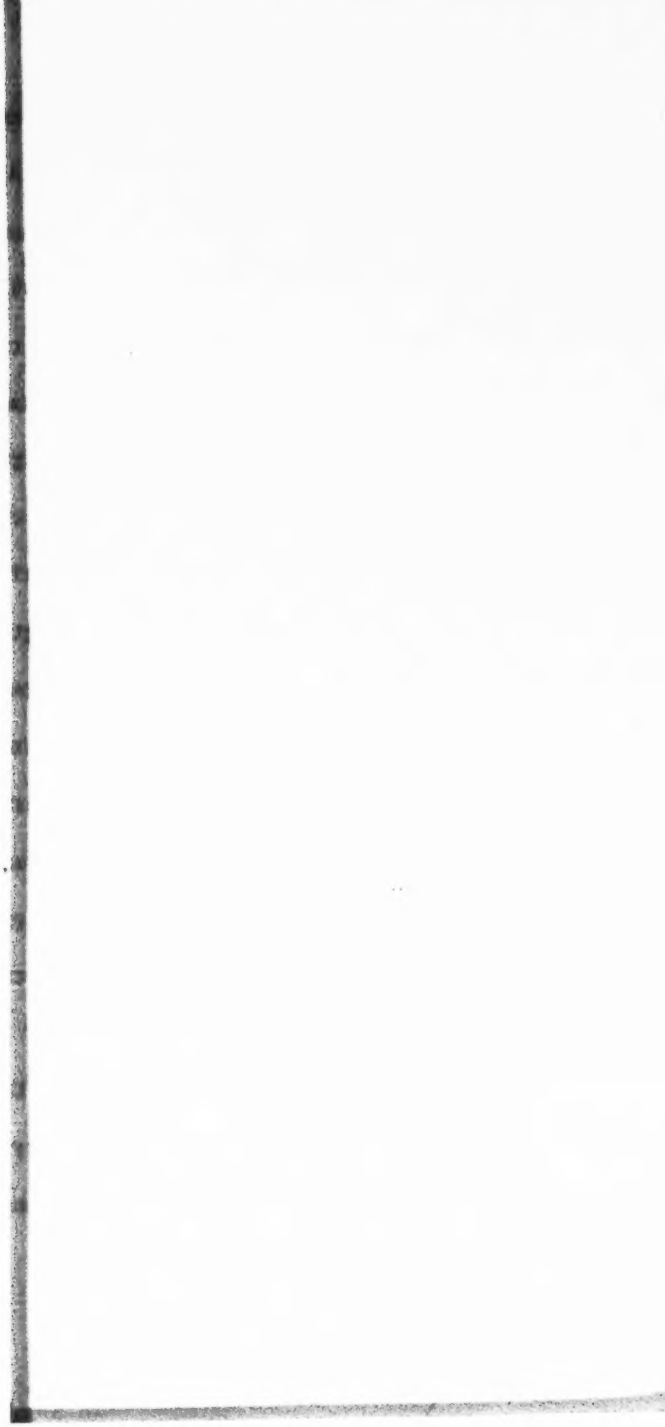
factual representations concerning petitioner's Naval Reserve career, petitioner inquired into whether the Veterans Administration possessed a subpeona power for securing evidence for claimants. Petitioner was informed and instructed by contact officers on a multiplicity of occasions that the Veterans Administration possessed no such power and that they could do nothing to secure such evidence or any other evidence favorable to claimants.

Consequently, concurrently and subsequently, petitioner scoured the country seeking legal advise in an all out effort to rid himself of this wrongfully placed scourge and re-establish and recover his previously unblemished record. On one occasion, in fact, a reputable military lawyer in Michigan was prepared to sue both Dr. Carden and the social worker on the basis of the sworn testimony by doctor's chronologically before and after Dr. Carden's inept diagnosis that petitioner was in very fine and normal mental health for malpractice and breach



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of a professional confidence, respectively. Unfortunately, by that time three years had passed and the lawyer reported that it was too late to file suit. At each turn, petitioner, in seeking legal assistance, was thwarted by attorney averments that the statute of limitations had tolled on the opportunity for suit and that the Veterans Administration was totally immune from suit for acts heretofore described.

Petitioner had been scorned and his life torn and rankled for five long years by the chastisement and application of this defamatory and demeaning wrongfully placed label. Finally, in December, 1970 after petitioner's new automobile was stolen and wrecked and petitioner, by reason of prior angered times at the Veterans Administration and the Naval Reserve for not doing their jobs had no insurance to make the $500.00 in repairs necessitated thereby, decided that irrespective of what the lawyers had said and what petitioner in four

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months of legal study at Loyola School of Law had learned, there must be a higher law in the Fifth Amendment which would not prevent petitioner or any other responsible United States citizen from being deprived of a fair hearing and determination of such matters." So, petitioner set out to compel Dr." Carden to submit a written statement to the Veterans Administration requesting that even though he felt his analysis was correct petitioner should be accorded the opportunity of a fair hearing--the threat would have been made of the Veterans Administration board personnel themselves had their names been known." Unfortunately, however, the documentaries of their decisions had been lost long before in all of petitioner's forced moves." In fact, right up to the commission of the act seeking recovery of fundamental rights, petitioner was in privity with a lawyer, Mr." Richard Bryson of Santa Monica, who ostensibly was in the act of handling this case but had only requested that

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petitioner throw more money down the drain on obtaining a diagnosis by another psychiatrist without taking any positive steps himself toward determing the possibility of a suit against the Veterans Administration or made any preparations therefor.

Subsequently, petitioner was charged by Dr. Carden with violation of California Penal Code, §§523 and 524, attempted extortion.

Only after this charge was registered did petitioner disclose the nature of his past difficulties with the military to certain faculty members of Loyola University School of Law. Whereupon, he was guided to speak with General Roberts of that staff. General Roberts sided with petitioner and made arrangements for petitioner to discuss the matter with Colonel Robert Walker, one of the chief lawyers on the staff of the Los Angeles office of the Veterans Administration.

Colonel Walker informed petitioner that it

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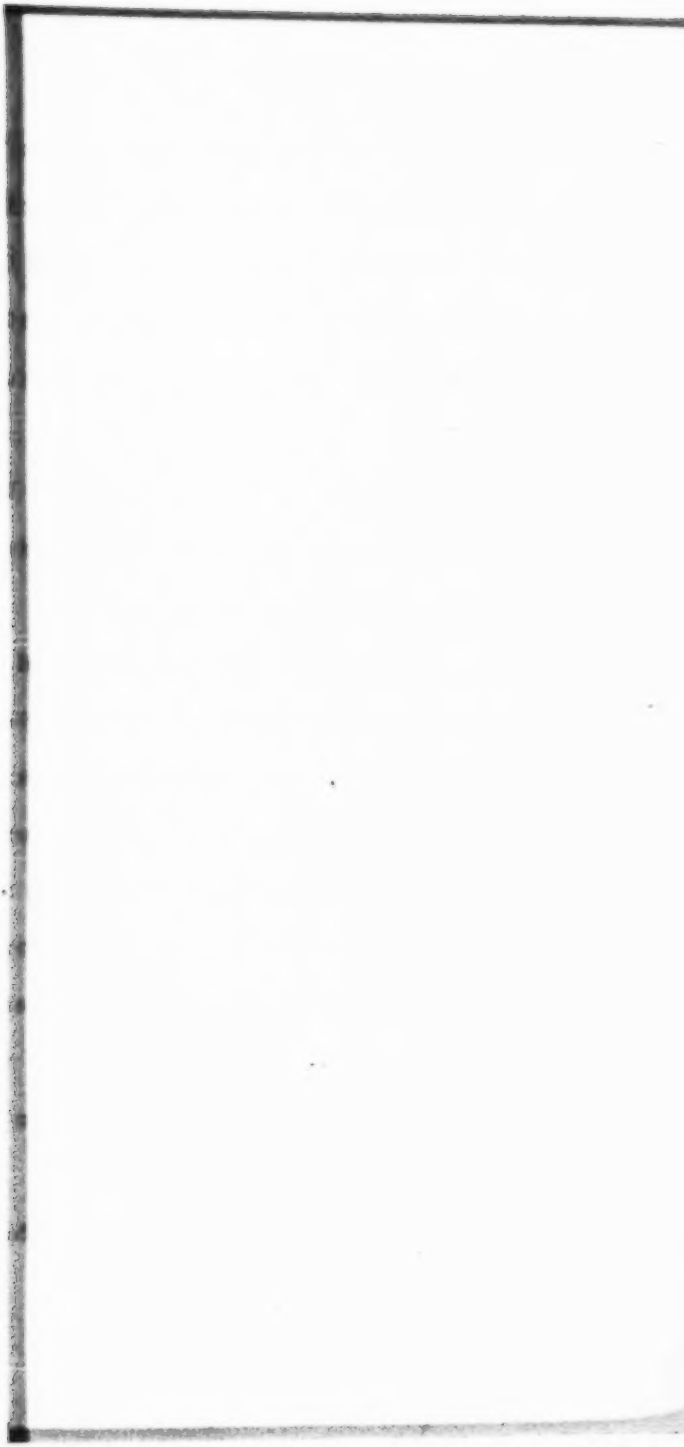

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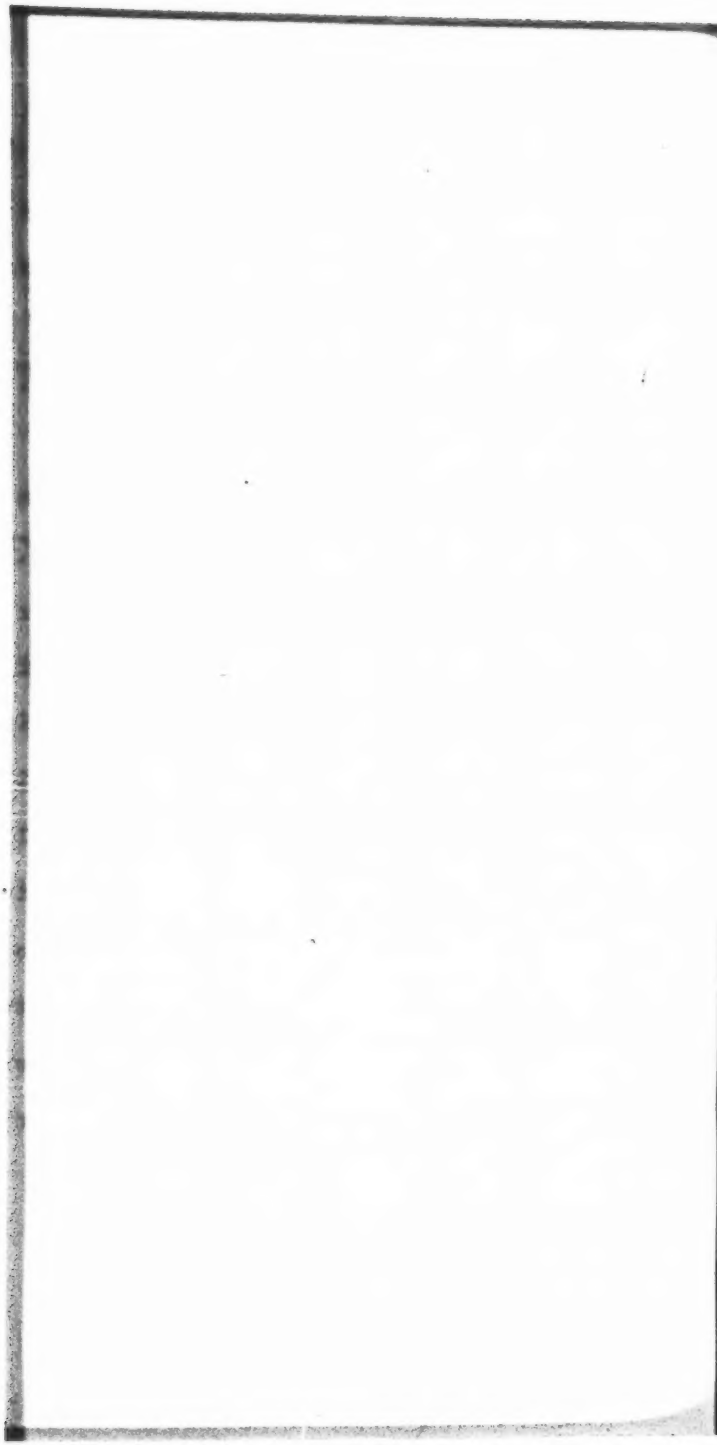
was his professional opinion that petitioner could sue the Veterans Administration, that he had a good case and, further, that some of the staff of the Veterans Administration were liable to lose their jobs. Owing to his position, he refrained from stating the grounds upon which suit would lie.

Later, in Contra Costa County, petitioner was forced to plead guilty to §524 of the above charges though he argued with his highly paid attorney, Lincoln N. Mintz of Oakland, that all he was seeking were those rights to which he was legally entitled and which had been wrongfully taken from him by Veterans Administration officials. Mr. Mintz untilized the devige of waiting until the case was before the court in a preliminary hearing, then compelling petitioner to a hurried whispered conference outside the courtroom at which time he sprung upon petitioner for the first time the thought that he, Mr. Mintz, felt petitioner

to be guilty as charged and then extorting the plea by threatening to represent petitioner in trial without any defense whatsoever and offering him a recommendation of straight probation by the district attorney if he would coalesce.

After petitioner's release from the California Medical Facility for observation in July, 1971 he instituted the within action.

In considering petitioner's motion for summary judgment on January 3, 1972, the District Court For the Central District Of California, the Honorable F. Avery Crary presiding, found that petitioner's rights under §19.133 and §19.135 of Title 38 of the Code of Federal Regulations had been usurped by Veterans Administration personnel during petitioner's many visits to the Los Angeles branch thereof in the summer of 1969. The Court found, however, no deprivation of petitioner's rights involved in the two written applications submitted by him and



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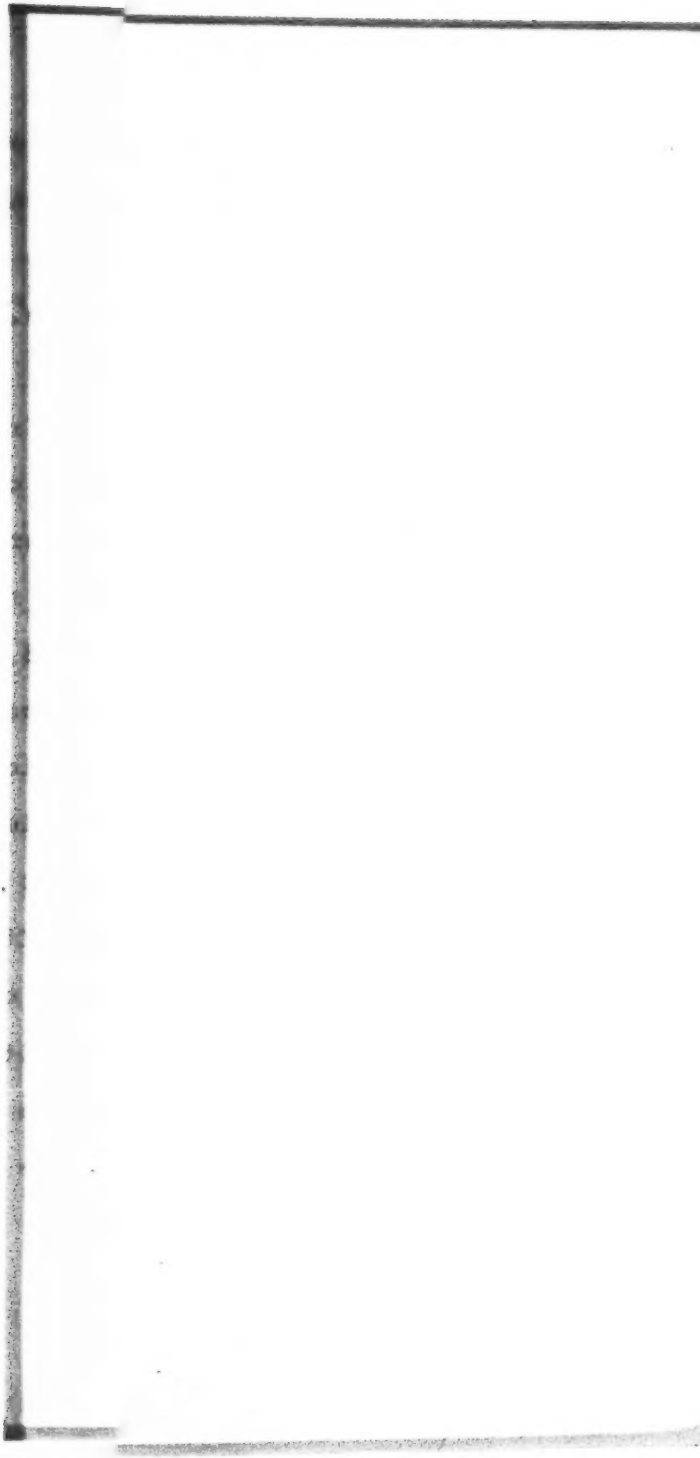
the responses made thereto by the rating board and board of appeals. That Court also found that it had no jurisdiction to review petitioner's conviction for alleged attempted extortion.

Petitoner appealed.

The Court Of Appeals For the Ninth Circuit held that petitioner's suit was, in substance, one to review a final determination by the Veterans Administration on a claim for benfits and not subject to review under U. S. C., Title 38, §211(a). It thus adopted the rather untenable position that Veterans Administration officials are authorized to usurp the rights of claimants before them and that such claimants cannot secure these rights through the courts. It also refused to review petitioner's conviction on Writ Of Habeous Corpus for the reason that petitioner had not first made application for same to the District Court in the district under whose process petitioner is being detained.



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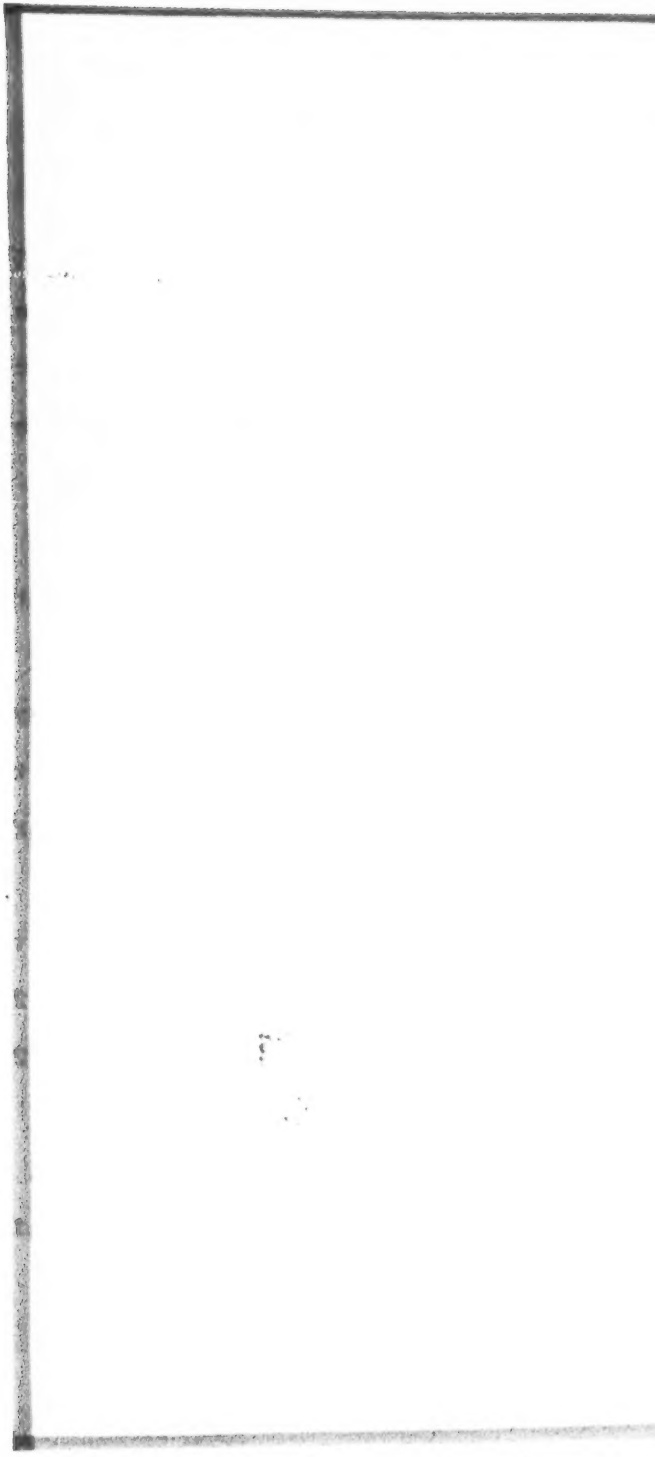
REASONS FOR GRANTING THE WRIT

The conflict presented herein is unique. This precise question has never heretofore been asked of or decided by the Ninth Circuit Court Of Appeals or any other federal appellate court. The decision below has not reached this point.

However, in each and every other case in which this Court or any other federal appellate court had decided whether mandate would issue to compel the performance of a ministerial duty by an officer of any agency other than the Veterans Administration, it has ruled in favor of the plaintiff seeking mandamus.

Chief Justice Taft long ago pointed the way in Work v. United States ex rel Rives, 267 U. S. 175, at 177, 178, 45 S. Ct. 252, (1925) stating:

> "Mandamus issues to compel an officer to perform a purely ministerial duty.



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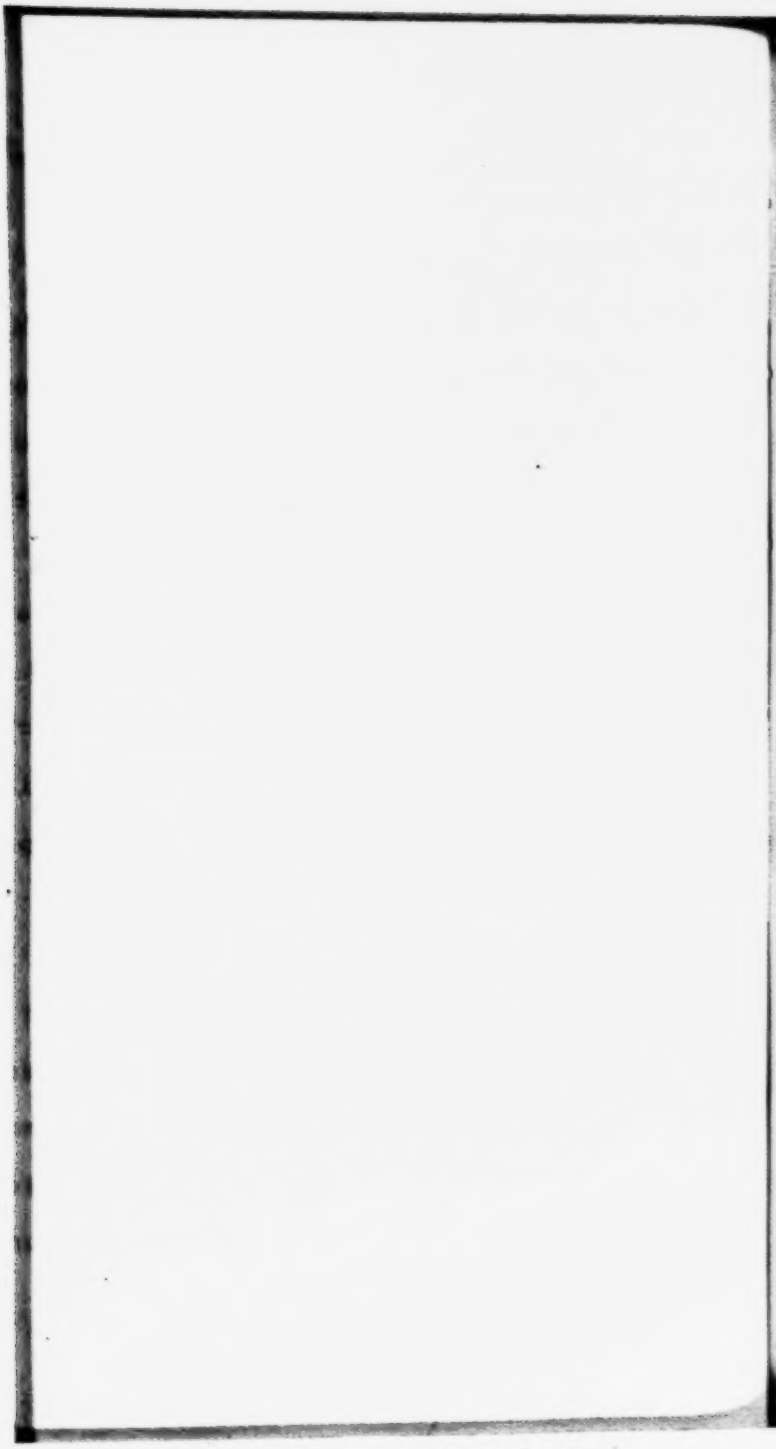
> It cannot be used to compel or control a duty in the discharge of which, by law, he is given discretion. The duty may be discretionary within limits. He cannot transgress those limits, and if he does to, he may be controlled by injunction or mandamus to keep within them. The power of the court to intervene, if at all, thus depends upon what statutory discretion he has ... The extent of the officer's discretion and the scope of judicial action depend upon a proper interpretation of the particular statute and the congressional purpose."

Thus, when a draft registrant claimed and proved that the application of the Universal Military Training and Service Act §1 et seq. as amended, 50 U. S. C. A. §451 et. seq. to his status as a second year law student would



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require his classification as 1-S, a writ of mandate issued to compel the officers of the local draft board to classify him in that manner, Carey v. Local Board No. 2, 297 F. Supp. 252, 412 F. 2d. 71, (1969). Moreover, where, as here, the army failed to follow its own regulations in considering an enlisted man's application for hardship discharge, the Court Of Appeals issued mandamus to require the army to reconsider the application properly, Feliciano v. Laird, 426 F. 2d. 424, (1970). See also, Cortright v. Resor, 325 F. Supp. 297, (1971).

Where a discharged federal employee sought reinstatement on the grounds that his removal was without charges and without opportunity to answer in violation of the Civil Service Act, the court also acted in mandamus to preserve his procedural safeguards, McEachen v. U. S., 212 F. Supp. 206, (1963). See also,

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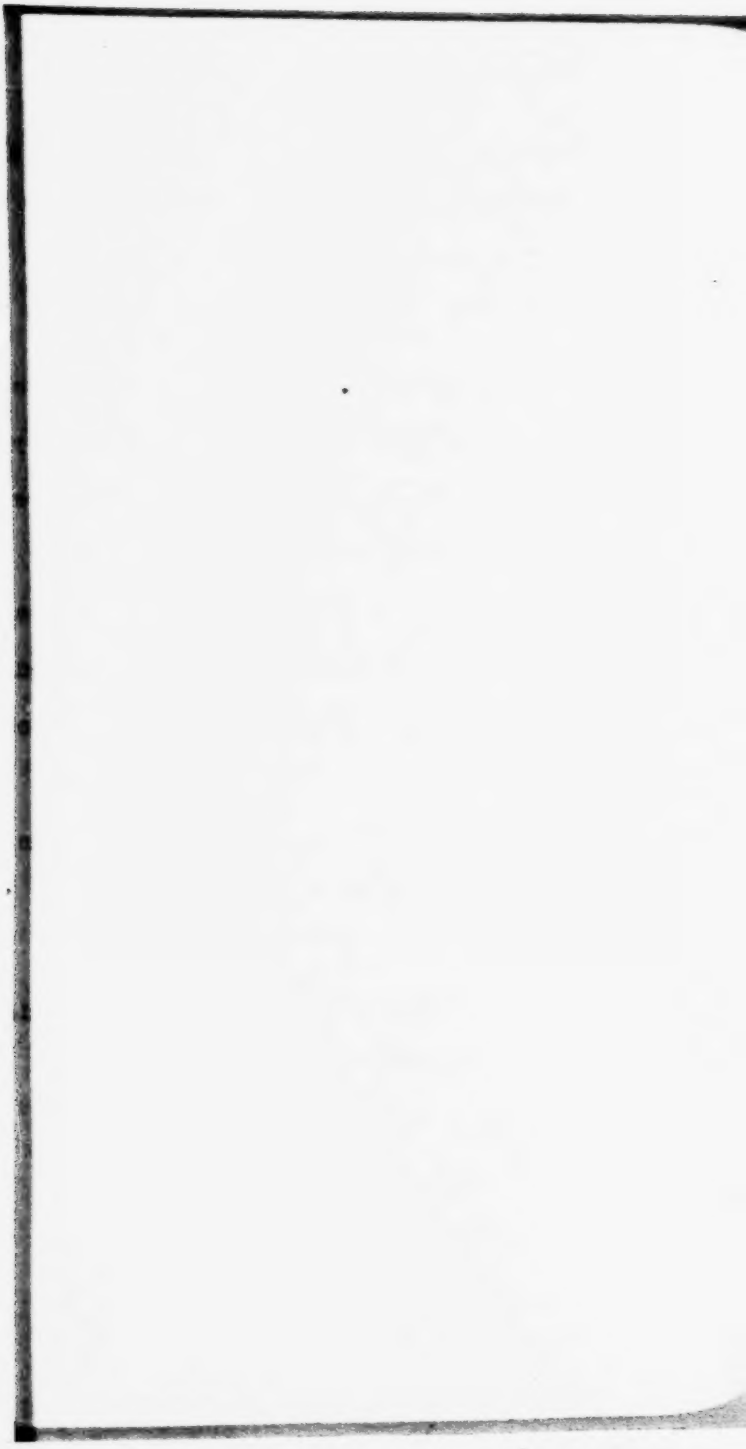
Philadelphia Co. v. S.E.C., 175 F. 2d. 808, reversed on other grounds, 337 U. S. 901, 69 S. Ct. 1047, (1949).

1a. The Veterans Administration has been created to administer various programs provided by the government to benefit those who have served her honorably. Included among the tasks with which it is charged are the determination of the origin and extent of disabilities adjudged by the military services to require separation therefrom.

In performing that adjudicative function it is certainly contemplated by 38 U. S. C., §354 which reads:

> "a) The Administrator shall include in the regulations pertaining to service-connected disabilities, additional provisions in effect requiring that in each case where



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a veteran is seeking service-connection for any disability due consideration shall be given to the places, types and circumstances of his service as shown by his service record, the official history of each organization in which he served, his medical record and all pertinent medical and lay evidence."

that the Veterans Administration's findings be based upon the factual documentary contained in a claimant's service record. This was not done in the instant case. Nor, for that matter, were the prerequisites of a hearing and the presentation of evidence of §19.133 and 19.135 of the C. F. R. satisfied.

Therefore, in view of the provisions of 5 U. S. C., §706(2), undoubtably this Court can have no choice but to hold unlawful and set aside this agency action.

In a recent case passed upon by this Court

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Chief Justice Douglas delivered the opinion of the Court that though the issuance of passports was a discretionary act,

> "In the absence of explicit terms in the pertinent statutes, the Secretary Of State has no authority to withhold passports from citizens because of their beliefs and associations."

Kent v. Dulles, 357 U. S. 116, 28 S. Ct. 1113, (1958). In a similar case, Bell v. Burson, 29 L. Ed. 2d. 90, (1971) this Court rescinded a Georgia statute authorizing the suspension of an uninsured motorist's motor vehicle registration and driver's license if he is involved in an accident and fails to post security on the grounds that it violates the procedural due process requirements of the Fourteenth Amendment. See also, U. S. v. Corporation of President of Church of Jesus Christ of Latter-Day Saints, 101 F.

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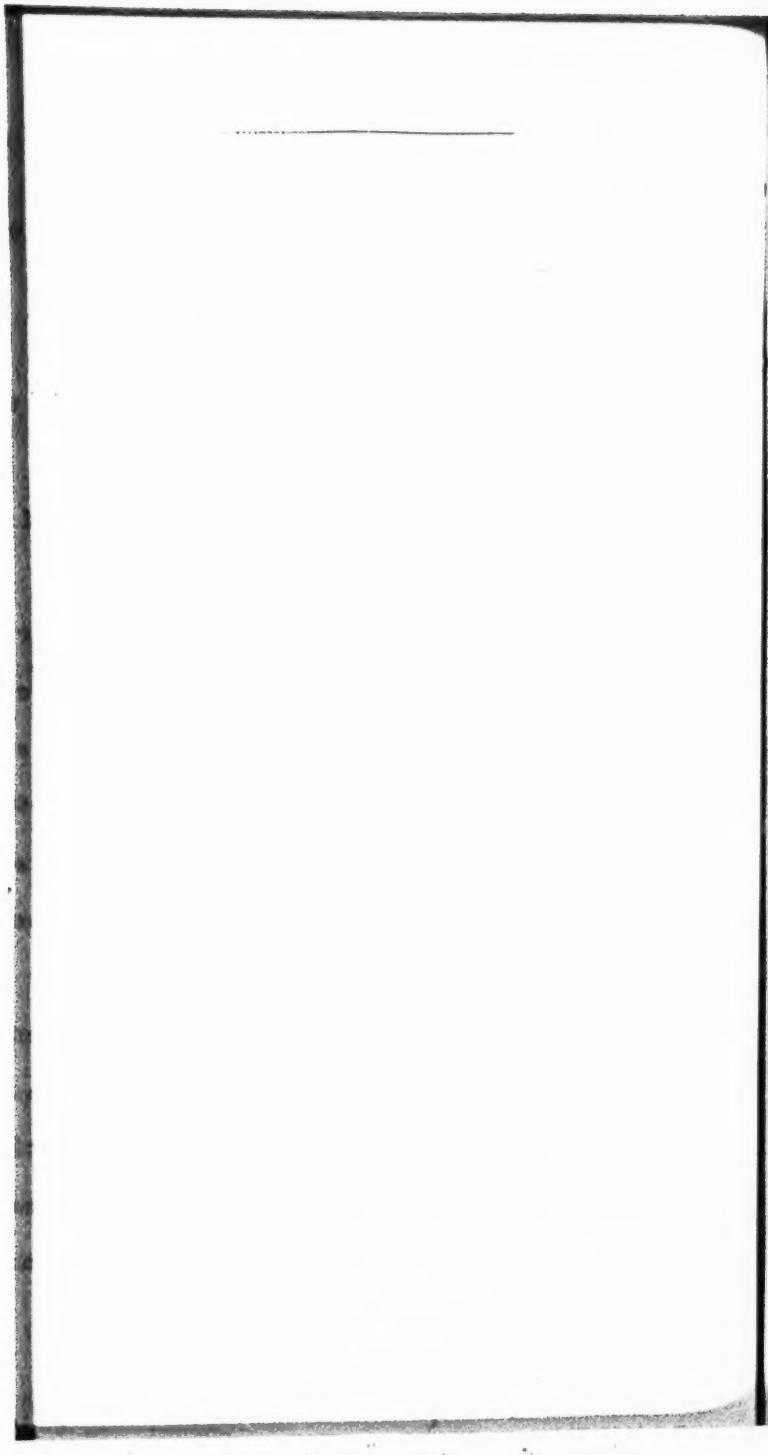
2d. 156 at 159, (1939), Ashe v. McNamara, 355 F. 2d. 277, 243 F. Supp. 243, (1965), and Murray v. Vaughn, 300 F. Supp. 688, (1969)

1b. In as much as the named Veterans Administration defendants would certainly have been liable for the cost of petitioner's successful suit in mandamus to compel their performance of a duty owed to petitioner had suit been instituted immediately after petitioner's (40) forty in person and telephone requests for a hearing to Veterans Administration contact officers during the summer of 1969 and probably susequent to the Board Of Appeals decision of February, 1968, and as it appears from the record that petitioner was eager to institute such action but that commencement was halted, forestalled and stopped in part by the representation of these very officials that they could not be sued upon those very grounds and the remainder by the advice of



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numerous lawyers siding with them, at least, petitioner's cost of suit herein, approximately $10,000.00 should be taxed against these defendants as it would have been but for such fraud.

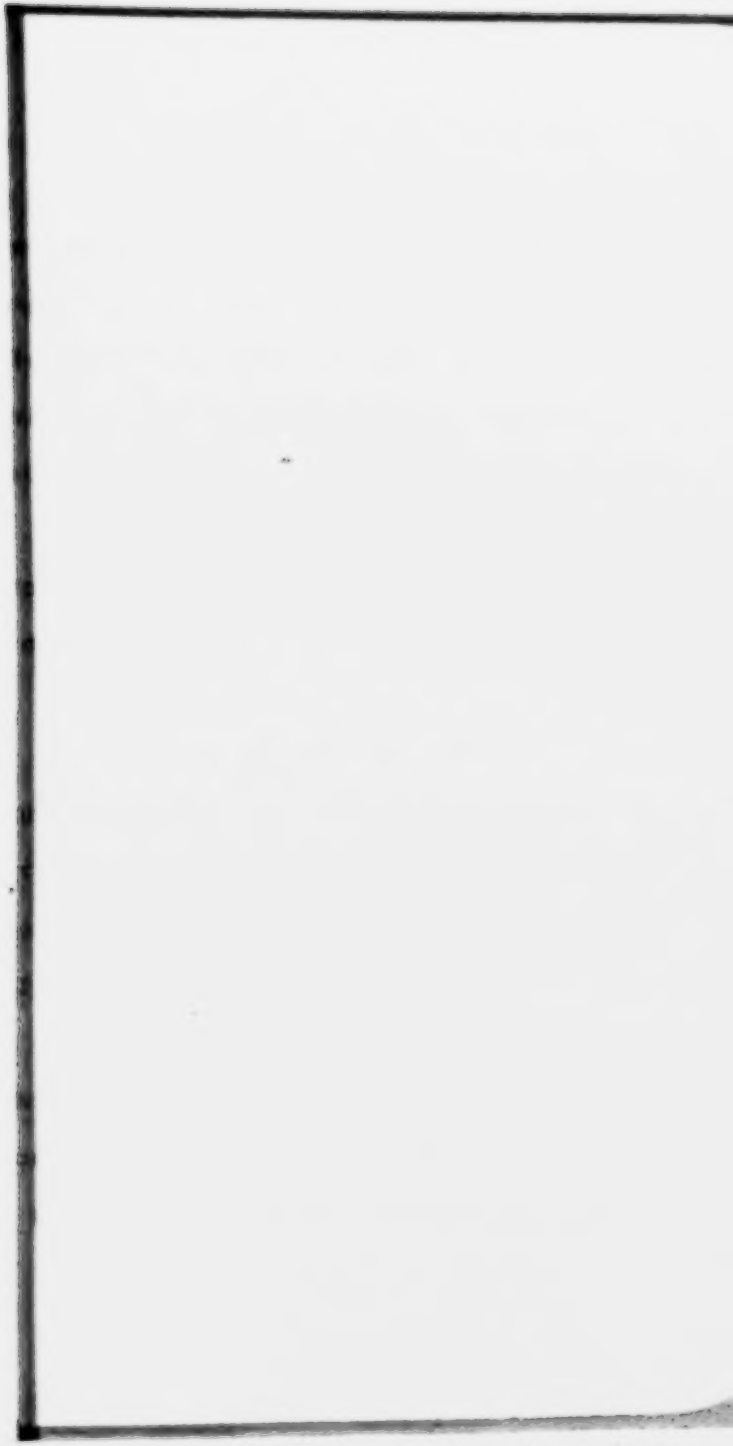
More appropriately, however, they should be liable for the full amount of petitioner's cost of suit in finding out that it was possible to sue the Veterans Administration or approximately $70,000.00.

1c. As these Veterans Administration officials have not yet accorded petitioner herein the type of administrative proceeding due him under the law, namely, one in which his claim for benefits is based upon his true service record and wherein his own documentary and expert medical witnesses can be present at a hearing, a writ of mandamus is still in order to compel such a proceeding and

should issue."

id." From a review of 38 U." S." C"., §354 it becomes patently clear that Congress intended a service man's records to serve as the primary basis of all disability determinations". In arriving at a finding in petitioner's case the defendant members of the Veterans Administration completely and totally abrogated this requirement and in so doing rendered their decision null and void".

2." After the aggravation of the five previous years coupled with the repeated representation by numerous attorneys, including representatives of the U" S" Attorney's staff and the California District Attorney's office in the summer of 1969 and a stolen and damaged automobile immediately before, petitioner in December, 1970 resolved to secure his rights before the Veterans



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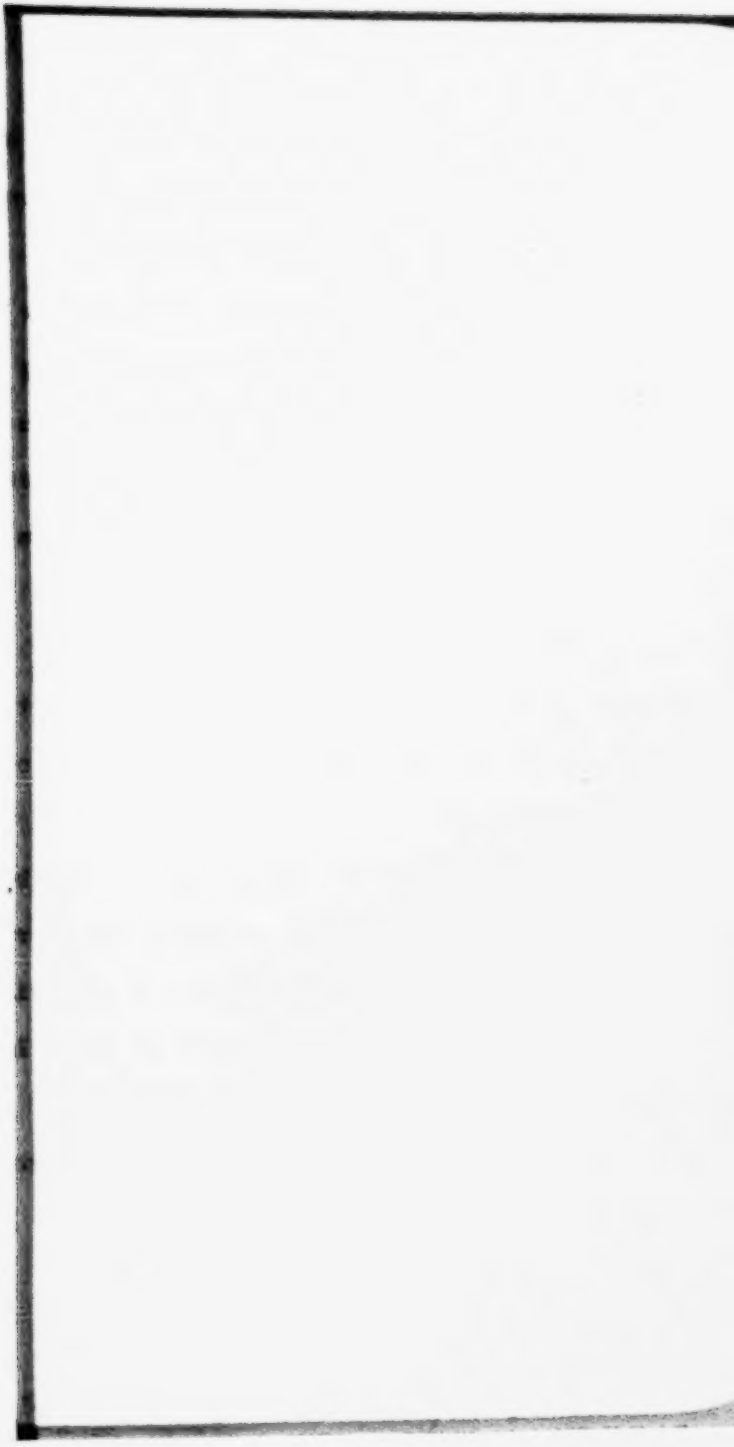
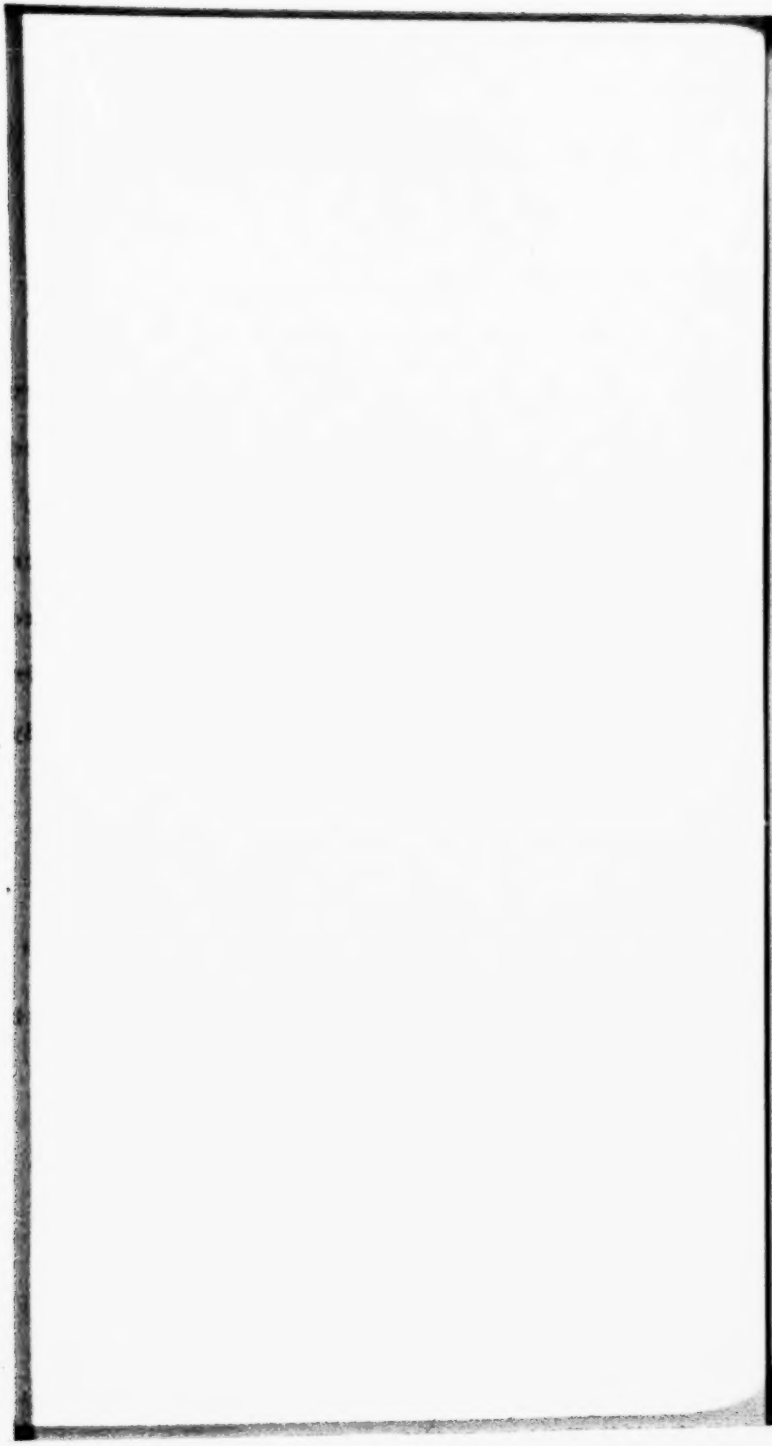
Administration and the probable clearing of his military record in whatever non-violent way possible." In that month petitioner sought to have Dr. Carden submit a letter to the Veterans Administration requesting that they accord petitioner his rights to a hearing and the presentation of evidence, an act which he flatly refused to perform, or admit the falsity of certain factual statements made in his narration of petitioner's service history." The threat would have been made against the local board members had their names been know--all correspondence with the local board had been lost in petitioner's many force moves, or more preferably the enforcement of petitioner's rights would have been effected by suit if these many lawyers had not lied or been incompetent or decided the issues in favor of Dr. Carden on their own."



Upon the advice of professors at Loyola University School Of Law where petitioner was in attendance, he secured a local "defense" counsel in Oakland, petitioner would have preferred to handle the defense himself, but wiser heads prevailed. Unfortunately, though foretold only subtlely theretofore, Mr. Lincoln N. Mintz proved to be dishonest at the preliminary hearing. Though petitioner had at the arraignment on charges of attempted extortion under California Penal Code §523 and §524 pleaded not guilty, moved for dismissal and moved for a jury trial and had always professed his innocence to Mr. Mintz, on the date of April 1, 1971 at the preliminary hearing petitioner was given no other choice but to plead guilty. Prior to April 1, 1971 petitioner had asked his counsel to waive the preliminary hearing which act Mr. Mintz

refused to perform and instead mandated that petitioner be present or suffer the consequences.

With the case before the court on that fatal day of April 1, 1971, petitioner argued his innocence with Mr. Mintz in a whispered conference outside courtroom doors. After "defense" counsel offered a district attorney recommendation of straight probation in exchange for a plea of guilty to §524, petitioner voiced his rejection. But when Mr. Mintz, already having professed his deep committment to petitioner's guilt, turned on his heel to rush back into the courtroom vowing to petitioner without any defense whatsoever, petitioner reasoned, unaware of his absolute right to remove Mr. Mintz, that once he instituted suit against the Veterans Administration which he now knew would be possible, he would certainly be able to



obtain a reversal of the conviction on appeal. At any rate, it would be suicide to go to trial with the certainty of a long prison term under Mr. Mintz's prejudice and incompetent legal guidance. Petitioner should have represented himself, but even then he would probably have needed a ruling from this Court upon which to rely.

It is obvious from this relation of events that petitioner has been damaged and that the injury to him is real and immediate. Petitioner needs relief.

As a result of the knowledge gained in perfecting this suit, petitioner is presently engaged in suing the attorney's who represented that such suit in mandamus against the Veterans Administration is not possible, and Mr. Lincoln N. Mintz against whom he is also seeking disbarrment. Premised upon the true service record now available as a consequence of this

action, petitioner is now seeking and feels extemely confident of receiving relief from the Board For the Correction Of Naval Records and the Board For the Correction Of Air Force records in the nature of having his entry into and discharge from the Air Force rescinded and his Naval Reserve records changed to reflect advancement to electronics technician third in March, 1964 and completion of Naval Reserve Officer Candidate School in the summer of 1965 with three years of active duty as a Naval Reserve officer dating from January, 1966.

Meanwhile, petitioner continues to petition the courts for a writ of habeous corpus to rid himself of the horrid label of criminal.

Therefore, petitioner respectfully submits that he should be released from detention and asks this Court to do all in its power to accomplish the same.

Furthermore, Judge Norman A. Gregg of Department 6 of the Contra Costa County Superior Court has indicated that part of the reason for sustaining the conviction was that petitioner should have known that "anybody can be sued," (See Appendix C, p. 66, infra.

3. Since numerous lawyers also participated in the fraud which frustrated, delayed, stifled and dissolved this action and created untold mental pain and suffering for petitioner, they, as well, deserve and should incur liability for petitioner's damage to date. Consequently, petitioner asks that this Court issue an order to that effect.

4. Having given up, after five long years, on suing the Veterans Administration to obtain those rights guaranteed him by the

regulations governing its conduct, solely because of 38 U. S. C., §211(a) and the surety of at least securing military responsibility for the alleged unfortunate situation, petitioner's interest in securing these rights was reactivated only upon the theft and smashing of his newly acquired automobile without insurance to cover same. Whereupon, he rushed to compel Dr. Carden to get the Veterans Administration to do its job and grant petitioner a hearing and the opportunity to present evidence showing Dr. Carden to be a liar and placing the blame on the military of in the alternative admit of his own volition that certain factual statements he made in his report were bare-faced lies.

Shortly, thereafter petitioner was charged with attempted extortion by the Contra Costa County Sheriff's department. Only then did

petitioner reveal to this Loyola Law school professors the nature of the trouble he had had previously in the military and later in securing a hearing before the Veterans Administration boards where he could present factual and medical testimony favorable to his position of mental well-being." It was then that he was placed in contact with, through back door means, Veterans Administration lawyer Colonel Robert Walker." This was the first time, though petitioner had contacted tens of previous lawyers, that any legal mind had ever represented to petitioner that suit against the named Veterans Administration officials would be possible." But Colonel Walker was not satisfied simply with this statement, he went on further to say, "some Veterans Administration officials may lose their jobs." Petitioner sincerely believes that in view of his previous experience with

numerous reputable attorneys, that if he had never been placed in contact with the unbaised Colonel Walker, he would remain, to this very day, ignorant of the fact that suit could be sustained against the Veterans Administration or its employees.

As is obvious from the communication documentary between petitioner and the Veterans Administration petitioner has always been ready, willing and eager to sue the Veterans Administration in order to secure a fair hearing and extremely confident of the outcome of such hearing. The record shows that petitioner intially requested "a hearing before a judge with all the appropriate witness present," thus demonstrating that petitioner was always eager to have the truth ferretted out with all the alacrity possible. It was only as a result of these Veterans Administration officers' innuendo that

that petitioner was a liar by saying that the examiners' would have no reason to report facts other than related by the veteran when he presented the true facts of the case in July, 1967, refusal to grant petitioner the opportunity of proving the veracity of his rendition of the events and representation of these officials that none of their decisions of law or fact could be reviewed in a court of law that petitioner exuded an expression of anger which shortly after the "final decision" of the Veterans Administration in February, 1968 caused the loss of petitioner's bride to be accompanied concurrently with the loss of many close friends and closely followed by the loss of petitioner's job which was the only one petitioner could get with Dr. Carden's stigma riding on his record, although hundreds have been offered previously. 1 These events were followed by further depression and

catastrophy, notably recorded in petitioner's automobile traffic record. Thus, petitioner respectfully requests that this Court return his, prior to February 1968, impeccable driving record in order that his insurance rates might be placed upon the appropriate level for one with his normal degree of care.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit Court Of Appeals.

Respectfully submitted,

BY: Michael S. Ross
MICHAEL S. ROSS

2879 Rutgers Avenue
Long Beach, California 90815

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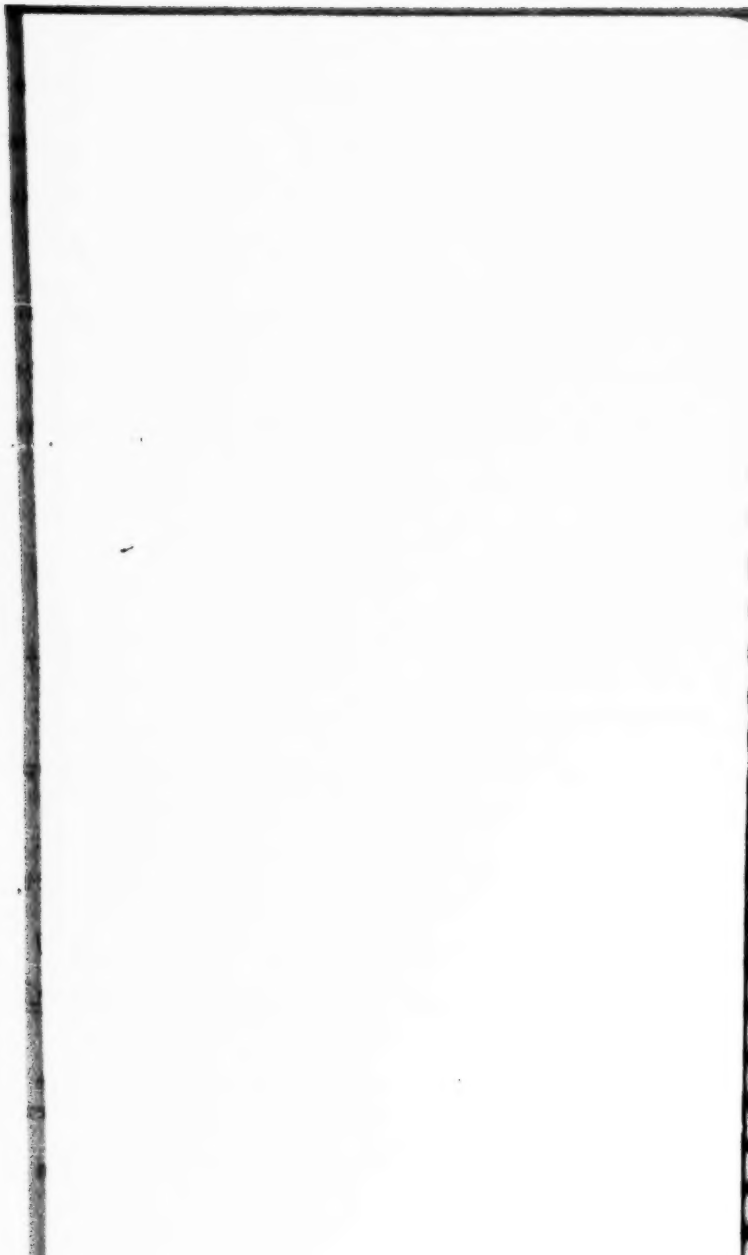

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JUN 28 1972

CLERK

MICHAEL S. ROSS,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, et al.,

Defendants-Appellees.

No. 72-1367

Appeal From the United States District Court for the Central District of California

Before: BROWNING, HUFSTEDLER, and WRIGHT, Circuit Judges

PER CURIAM:

Appellant's complaint against the United States, the Veterans' Administration, the Air Force, a Naval Reserve doctor named Carden, and the members of the Veterans' Administration Rating Board and the Appeals Board was properly dismissed by the district court for want of jurisdiction of the subject matter.

The root of appellant's claim is that Dr. Carden caused a defamatory psychiatric report to be placed in appellant's file which was later used by the Rating Board to deny him veteran's benefits. He asserted that he was denied due process and that he was defamed and defrauded by the actions of the Rating and Appeals Boards. Although the complaint is in the form of a civil damage suit, the substance of the action is to obtain judicial review of a final determination by the Veterans' Administration. Title 38 U.S.C. § 211(a)[1] forecloses judicial review, with exception not here material.

1. In pertinent part § 211(a) provides: "[T]he decision of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors is final and conclusive and no other official or any court of the United States

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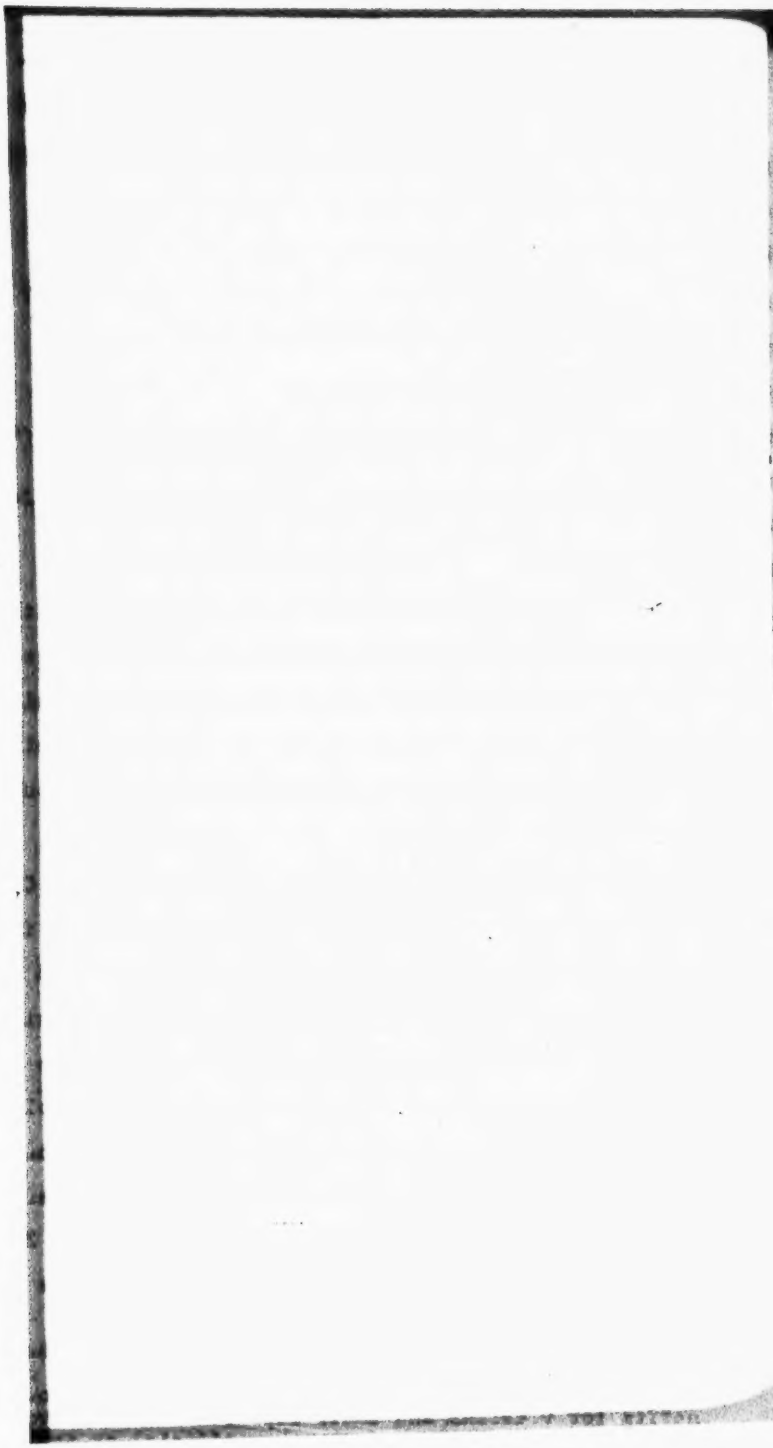

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(Fritz v. Director of Veterans Administration (9th Cir. 1970) 427 F.2d 154; Redfield v. Driver (9th Cir. 1966) 364 F.2d 812; Milliken v. Gleason (1st Cir. 1964) 332 F.2d 122, cert. denied 379 U.S. 1002; see Lynch v. United States (1934) 292 U.S. 571, 587.)

> "When the United States creates rights in individuals against itself, it is under no obligation to provide a remedy through the courts. United States v. Babcock, 250 U.S. 328, 331. It may limit the individual to administrative remedies Tutun v. United States, 270 U.S. 568, 576."
> (Lynch v. United States, supra, 292 U.S. at 582.)

Because the jurisdictional point disposes of the litigation, it is unnecessary to discuss appellant's remaining contentions.

The judgment is AFFIRMED.

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APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

OFFICE OF THE CLERK
U.S. COURTHOUSE, RM. G-8
LOS ANGELES, CALIFORNIA 90012

EMORY G. HATCHER
CLERK

MICHAEL S. ROSS
2812 S. Pelham Ave.
Los Angeles, California 90025

UNITED STATES ATTORNEY
312 No. Spring Street
Los Angeles, California 90012
Attn: Clarke A. Knicely

Michael S. Ross v. The United States of America, et al.

Civil Case No. 71-1909-EC

You are hereby notified that JUDGMENT IN FAVOR OF DEFENDANTS, in the above-entitled case, was entered in the docket on Jan 11, 1972 (Date)

You are also notified that if you introduced exhibits into evidence in this case, they must be claimed at this office within thirty days after receipt of this notice, if no appeal is taken Unless you respond within thirty days, they will be destroyed or otherwise disposed of pursuant to Local Court Rule 20(a)

☐ Copy Enclosed ☒ Copy Not Enclosed

Emory G Hatcher, Clerk
UNITED STATES DISTRICT COURT

Date of Mailing: Jan 11, 1972

By R. L. Byer
R. L. Byer, Deputy Clerk

Civ 27 3/71
Notice of Entry of Judgment

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This is an important issue.

THE DEFENDANT: This is an important issue, but like I say, I did not know what the law on the particular situation was; in other words, what needed to be proven in order to show that I was guilty. You know, I feel I'm guilty in the sense that it's not right to, you know, threaten somebody in any way, sense or form, but I feel in the same sense that the V. A. is guilty of threatening me by threatening me that I cannot sue them in order to get what I/legally authorized to have.

THE COURT: You know as well as I do that you can sue anybody. All you have to do is go to the proper clerk's office, file a proper complaint and pay a proper filing fee.

THE DEFENDANT: Not the U. S. Government, I wasn't aware of that, at least at the time this particular message was sent to me by the Veterans' Appeal Board in Washington, D. C. I was not aware I could sue the government without their consent.

THE COURT: Well, here, we were talking about, Mr. Ross, you doing something about your plea of guilty that you have entered in this matter. Is there something you want to do about that plea? Well, if you feel that that plea --

THE DEFENDANT: I think I would first like to read the probation report, if I could possibly, sir.

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STATE OF CALIFORNIA)
)
CITY OF LONG BEACH, COUNTY OF LOS ANGELES)

Clarence J. Schulz, Jr., being first duly sworn on oath, says:

I am a citizen of the United States and a resident of the City of Lakewood and County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 223rd and Alameda Streets, Carson, California.

On August 18, 1972, I served the within "PETITION FOR A WRIT OF CERTIORARI" on the Solicitor General of the United States in said action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States post office mail box at Long Beach, California addressed as follows:

Erwin N. Griswold

Solicitor General of the United States

Department of Justice Building

Constitution Avenue between 9th and 10th Streets

Washington, D. C., 20530

CLARENCE J. SCHULZ, JR.

STATE OF CALIFORNIA
COUNTY OF Los Angeles } SS.

On August 17, 1972 before me, the undersigned, a Notary Public in and for said County and State, personally appeared CLARENCE J. SCHULZ, JR.

known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same.

Sandra Murray

Name (Typed or Printed)
Notary Public in and for said County and State

FOR NOTARY SEAL OR STAMP

OFFICIAL SEAL
SANDRA MURRAY
NOTARY PUBLIC — CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires June 21, 1976

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-337

MICHAEL S. ROSS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

---

1. While petitioner was in the military service, he was admitted to an Air Force Hospital for a psychiatric problem. After observation and examination by Dr. Carden, a psychiatrist, a psychiatric report was placed in petitioner's file. This report was later relied on by the Rating and Appeals Boards of the Veterans' Administration in denying petitioner's claim for veterans' benefits.

Petitioner then brought this suit for damages against the United States, the Veterans' Administration, the Air Force, Dr. Carden, and members of the Rating and Appeals Boards. The gravamen of the complaint was that the psychiatric report contained false and defama-

tory statements and should not have been used in determining his eligibility for veterans' benefits. Petitioner further complained that, because of the alleged lack of adequate hearing procedures, he was unable to refute the report.

Affirming the district court's dismissal of the action for lack of jurisdiction over the subject matter, the court of appeals stated that "[a]lthough the complaint is in the form of a civil damage suit, the substance of the action is an attempt to obtain judicial review of a final determination by the Veterans' Administration" (Pet. App. A, p. 63). As such, the court concluded, it was barred by 38 U.S.C. 211(a) which, insofar as here relevant, provides:

> [T]he decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

2. The decision of the court of appeals is correct and review by this Court is not warranted. Petitioner is attempting to overturn the decision of the Veterans' Administration that he is not entitled to veterans' benefits. As the court below held, 38 U.S.C. 211(a) bars such judicial review.[1]

---

[1] There can be no doubt respecting the constitutionality of Section 211(a). As has been consistently recognized, Congress may attach conditions upon the grant of veterans' benefits, including

In any event, a suit for damages will not lie in the circumstances of this case. Petitioner does not dispute that, in preparing the psychiatric report, Dr. Carden was acting within the scope of his official duties, as were the members of the Rating Board and the Appeals Board in denying petitioner's claim for benefits. Accordingly, under the official immunity doctrine enunciated in *Barr* v. *Matteo,* 360 U.S. 564, these federal employees are not personally liable in damages.[2]

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1972.

---

the condition that the administrative determination concerning eligibility shall be final. *Milliken* v. *Gleason,* 332 F. 2d 122, 123 (C.A. 1), certiorari denied, 379 U.S. 1002; *Barefield* v. *Byrd,* 320 F. 2d 455, 457 (C.A. 5), certiorari denied, 376 U.S. 928; *Klein* v. *Lee,* 254 F. 2d 188, 190 (C.A. 7), vacated as moot, 358 U.S. 645; *Hahn* v. *Gray,* 203 F. 2d 625, 626 (C.A.D.C.); *Strong* v. *United States,* 155 F. Supp. 468, 469 (D. Mass.), appeal dismissed, 356 U.S. 226; *Napier* v. *Veterans' Administration,* 187 F. Supp. 723, 726 (D. N.J.), affirmed, 298 F. 2d 445 (C.A. 3), certiorari denied, 371 U.S. 186. Cf. *Lynch* v. *United States,* 292 U.S. 571.

[2] Nor would a Federal Tort Claims Act suit lie against the United States. That Act does not apply to any claim arising out of libel or based upon the exercise of a discretionary function. 28 U.S.C. 2680(a), (h).

☆ U.S. Government Printing Office: 1972—477-147/187

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 72-567

MICHAEL A. BOWE, Petitioner

v.

UNITED STATES OF AMERICA, et. al.

PETITION FOR REHEARING

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-337

MICHAEL S. ROSS, Petitioner

v.

UNITED STATES OF AMERICA, et al.

ON PETITION FOR REHEARING

---

1. On January 3, 1972 the Honorable Judge E. Avery Crary of the United States District Court For the Central District Of California ruled that the defendant members of the Veterans Administration had violated plaintiff's due process rights in 1968 and that such action was in 1968 correctable by a suit in equity to compel compliance with the law.

Consequently, there is by judicial decision no means of enforcing the provisions of 38 U. S. C., §211, precluding judicial review of any decision of fact or law against an applicant exerting his rights under C. F. R., Title 38, §§19.133 and 19.135 or 38 U. S. C., §354. The only rational conclusion, then, is emphatically that 38 U. S. C., §211 violates the due process protections of the Fifth Amendment and is, therefore, unconstitutional.

Moreover, although recurrence of the instant case wherein authorities have falsified the applicant's record is remote, there exists in transactions between claimant's and Veterans Administration officials a broad spectrum of controversies wherein Veterans Administration officials have failed or refused to perform those specific non-discretionary duties required of them by law and which would be readily

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fairly resolved by simple lawful compliance.

In addition, as a matter of public policy it is certainly preferable to have our young men roaming the streets knowing they have received a fair airing of their grievances though they may not be in accord with the results thereof than to roam the streets in anger, hate and frustration over having been wrongfully or negligently deprived of those rights for the preservation of which they had pledged their very lives. Consequently, there is a definite need for judicial review of non-discretionary Veterans Administration decisions.

In any event, if these diametrically opposite holdings are allowed to stand, then the clear meaning of total impasse to or impossibility of suit defined by the words of 38 U. S. C., §211 is flagrantly misleading. While plaintiff's exhaustive search has not uncovered a

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single case of successful mandamus litigation against Veterans Administration officials, neither has it disclosed a single case seeking this type of relief; apparently, the instant case is the first ever attempted and only successful one to date. Is it not wiser ploy to allow compulsory performance of ministerial duties by mandate under 28 U. S. C., §1361 than to protect negligent omissions, commissions and unauthorized acts of federal Veterans Administration employees with the cloak of immunity and unleash a miriad of disgruntled and antagonistic young men on society?

Apparently, Chief Justice Taft thought so when he announced in Work v. United States ex rel Rives, 267 U. S. 175, at 177, 178, 45 S. Ct. 252, (1925) that:

"Mandamus issues to compel an officer to perform a purely

> ministerial duty. It cannot be used to compel or control a duty in the discharge of which, by law, he is given discretion. The duty may be discretionary within limits. He cannot transgress those limits, and if he does so, he may be controlled by injunction or mandamus to keep within them. The power of the court to intervene, if at all, thus depends upon what statutory discretion he has... The extent of the officer's discretion and the scope of judicial action depend upon a proper interpretation of the particular statute and the congressional purpose."

Consequently, when a draft registrant claimed and proved that the application

of the Universal Military Training and Service Act §1 et seq. as amended, 50 U. S. C. A. §451 et seq. to his status as a second year law student would require his classification as 1-S, a writ of mandate issued to compel the officers of the local draft board to classify him in that manner, Carey v. Local Board No. 2, 297 F. Supp. 252, 412 F. 2d. 71, (1969). Moreover, where, as here, the army failed to follow its own regulations in considering an enlisted man's application for hardship discharge, the Court Of Appeals issued mandamus to require the army to reconsider the application properly, Feliciano v. Laird, 426 F. 2d. 424, (1970). See also, Cortright v. Resor, 325 F. Supp. 297, (1971).

Where a discharged federal employee sought reinstatement on the grounds that his removal was without charges and

without opportunity to answer in violation of the Civil Service Act, the court also acted in mandamus to preserve his procedural safeguards, McEachen v. U. S., 212 F. Supp. 206, (1963). See also, Philadelphia v. S. E. C., 175 F. 2d. 808, reversed on other grounds, 337 U. S. 901, 69 S. Ct. 1047, (1949).

Finally, when plaintiff's military record is corrected, based solely upon plaintiff's true Naval Reserve record, momentarily to reflect three years of honorable service as a Naval Officer, these Veterans Administration officials will become guilty of criminal conduct for intent to defraud and failure to comply with the provisions of 38 U. S. C., §354 as will commanding officer, Jerry J. Holst of N. R. S. D. 12-26 for thefting plaintiff's Naval Commission and Dr. Carden for falsifying an official government

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record, for Harmon v. Brucker, Secretary of the Army, 355 U. S. 570, 78 S. Ct. 433, (1958) propogated the mandate that,

> "38 U. S. C., §639h (now 8 U. S. C., §1553) which requires that the findings of the Army Review Board 'shall be based upon all available records relating to the person requesting such review;' the word 'records' means records of military service."

CONCLUSION

For the aforestated reasons the plaintiff respectfully requests that the provisions of 38 U. S. C., §211 precluding mandamus actions to enforce the performance of non-discretionary ministerial duties by Veterans Administration personnel be declared unconstitutional and that the decision in plaintiff's case be vacated

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and replaced by a determination made upon according plaintiff all the normal procedural safeguards.

CERTIFICATE OF GOOD FAITH

I, Michael S. Ross, certify that the foregoing petition for rehearing is made in good faith, in conformance with the provisions of Rule 58 (2) Of the Supreme Court Rules and not for delay or obstruction, except for the long-awaited interjection of plaintiff's corrected military record.

Respectfully submitted,

Michael S. Ross

Michael S. Ross